Supreme Court, U.S
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No. 04-1152

In the Supreme Court of the United States

DONALD H. RUMSFELD, ET AL., PETITIONERS

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

No. 03 Civ. 4433 (JCL)

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, A NEW JERSEY MEMBERSHIP CORPORATION, SOCIETY OF AMERICAN LAW TEACHERS, INC. A NEW YORK CORPORATION, COALITION FOR EQUALITY, A MASSACHUSETTS ASSOCIATION, RUTGERS GAY AND LESBIAN CAUCUS, A NEW JERSEY ASSOCIATION, PAM NICKISHER, A NEW JERSEY RESIDENT, LESLIE FISCHER, A PENNSYLVANIA RESIDENT, MICHAEL BLAUSCHILD, A NEW JERSEY RESIDENT, ERWIN CHEMERINSKY, A CALIFORNIA RESIDENT, AND SYLVIA LAW, A NEW YORK RESIDENT, PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE; ROD PAIGE, IN HIS CAPACITY AS U.S. SECRETARY OF EDUCATION; ELAINE CHAO, IN HER CAPACITY AS U.S. SECRETARY OF LABOR; TOMMY THOMPSON, IN HIS CAPACITY AS U.S. SECRETARY OF HEALTH AND HUMAN SERVICES; NORMAN MINETA, IN HIS CAPACITY AS U.S. SECRETARY OF TRANSPORTATION; AND TOM RIDGE , IN HIS CAPACITY AS U.S. SECRETARY OF HOMELAND SECURITY, DEFENDANTS

[Filed: Oct. 15, 2003]

SECOND AMENDED COMPLAINT

PRELIMINARY STATEMENT

1. This case is about the freedom of educational institutions, specifically law schools, to shape their own pedagogical environments and to teach, by word and deed, the values they choose, free from government intrusion. It is about whether the government may compel law schools to lend their resources, personnel, and facilities to propagate a message they abhor-a message of discrimination that violates the core values they inculcate in their students and faculty. The names and addresses of the parties to this lawsuit are: Plaintiff Forum for Academic and Institutional Rights, Inc. ("FAIR") is a membership corporation organized under the laws of the State of New Jersey and its address is Dwyer & Dunnigan, L.L.C. c/o Andrew Dwyer, 17 Academy Street, Suite 1010, Newark, NJ 07102. Plaintiff The Society of American Law Teachers, Inc. ("SALT") is a corporation whose members are law faculty and its address is Society of American Law Teachers, Inc. c/o Paula C. Johnson, Syracuse University College of Law, E.1. White Hall, Syracuse, NY 13244. Plaintiff The Coalition for Equality is an association whose address is The Coalition for Equality *clo* Gerald Mays and Sara Smolik, Boston College Law School, 885 Centre Street, Newton, MA 02459. Plaintiff Rutgers Gay and Lesbian Caucus is an association whose address is Center for Law and Justice, 123 Washington Street, Newark, NJ 07102. Plaintiff Pam Nickisher is an individual whose address is 63 Marrow Street, Newark, NJ 070103. Plaintiff Leslie Fischer, Ph.D. is an individual whose address is 63 Marrow Street, Newark, NJ 07013. Michael Blauschild is an individual whose address is 101 Bleeker Street, No. 64, Newark, NJ 07102. Plaintiff Erwin Chemerinsky is an

individual whose address is 329 N. Fuller St., Los Angeles, CA 90036. Plaintiff Sylvia Law is an individual whose address is 3 Washington Sq. Village, New York, NY 10012. Defendant Donald Rumsfeld is the Secretary of Defense whose address is 1000 Defense Pentagon, Washington, D.C. 20301-1000. Defendant Rod Paige is the Secretary of Education whose address is United States Department of Education, 200 Constitution Ave., N.W., Washington, DC 20202. Defendant Elaine Chao is the Secretary of Labor whose address is United States Department of Labor, 200 Constitution Ave., N.W., Washington DC 20210. Defendant Tommy Thompson is the United States Secretary of Health and Human Services whose address is United States Department of Health and Human Services, 200 Independence Ave., S.W., Washington, DC 20201. Norman Mineta is the Secretary of Transportation whose address is United States Department of Transportation, 400 7th Street, S.W., Washington, DC 20590. Tom Ridge is the Secretary of Homeland Security whose address is Department of Homeland Security, Washington, DC 20528.

2. For over a decade, nearly every accredited law school has maintained policies against offering its resources, support, or endorsement to any employer that discriminates. These non-discrimination policies apply whether the employer discriminates on the basis of race, national origin, gender, veteran status or any number of other attributes that, in the law schools' judgment, bear no relation to merit-including sexual orientation. In following this policy, law schools do not simply make a statement that invidious discrimination is a moral wrong and impart that view to their students; they also commit themselves to behave in a

manner consistent with their core value of judging people solely on their merits.

3. When law schools' non-discrimination policies came into conflict with the military's policies on sexual orientation-an employment policy that is, in the estimation of law faculties nationwide, invidiously discriminatory-law schools exercised their expressive and associational rights to enforce their non-discrimination policies even-handedly against military recruiters as they did against any other employer.

4. Congress responded in 1994 by enacting the so-called Solomon Amendment, which requires every institution of higher education to give military recruiters access to campus on pain of losing federal money. The purpose, the sponsors made clear, was to "send a message over the wall of the ivory tower" to "treat our Nation's military with the respect it deserves." 140 Cong. Rec. 11,441 (1994). Both the statute and its execution have become increasingly strict in the intervening years. In its current iteration, as interpreted by the military, the Solomon Amendment co-opts the career services staff, message centers, vehicles of communication, and on-campus interview rooms of a law school, by threatening to cut off virtually all federal funds not just to the law school, but to the entire university of which it is a part-unless the law school suspends its non-discrimination as applied to the military. As of the fall of 2003, for the first time, virtually all law schools in the nation have been forced to accept and support military recruiters on campus, under protest, in violation of the law schools' non-discrimination policies. This is the culmination of an effort that was launched by the Department of Defense ("DOD") in December 2001 and that has been fought and negotiated by law schools

around the country for the last year and a half. Over the summer of 2003, it became clear that virtually every law school in the country had been forced to violate its non-discrimination policy under the threat of the Solomon Amendment.

5. Plaintiffs turn to this Court to vindicate the right of law schools and law professors to choose for themselves, free from government interference, how best to advance their educational missions; what messages to articulate to their communities; and how to communicate those messages. Only this Court can restore the open environment of equality, mutual respect, and dignity that law professors and law students have grown to cherish and expect.

JURISDICTION AND VENUE

6. Subject matter jurisdiction is conferred upon the Court by 28 U.S.C. § 1331. Venue is proper pursuant to 28 U.S.C. § 1391(b) and (e).

THE PARTIES

Plaintiffs

Associational Plaintiffs

7. Plaintiff Forum for Academic and Institutional Rights, Inc. ("FAIR") is a membership corporation organized under the laws of the State of New Jersey. FAIR brings this lawsuit on behalf of its members. About half the members of FAIR are law schools. The other half are law school faculties that have voted as a body—by at least majority vote—to join FAIR. The law school faculties that are members of FAIR are the bodies that collectively, and autonomously, make law school policy, including the decision whether and how to implement non-discrimination policies.

a. FAIR's mission is to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education. FAIR members recognize and agree that their non-discrimination policies are central to their missions, for those policies contribute to a setting in which all participants in the dialogue are assured that they will be judged on the quality of their ideas rather than characteristics bearing no relation to merit.

b. Every member of FAIR was promised anonymity as a condition of joining FAIR. This anonymity is critical to the functioning of FAIR. FAIR's members are deeply concerned about being identified publicly, for they fear retribution by government officials and public vilification. Most of FAIR's members fear retribution not just against themselves but against their affiliate institutions within their university communities that rely heavily on government grants and congressional appropriations. They fear specifically that Members of Congress will cancel appropriations to their sister institutions behind closed doors and that Government bureaucrats will reject contracts or grants or will decline to renew them—all without any explanation, but as punishment for what they view as an affront to the military. They also fear that they and their sister institutions will be singled out for virulent and unfair attacks by politicians and in the press, attacks that have already materialized in such mainstream media outlets as the *Wall Street Journal*, *The Legal Times*, and Fox News. Such attacks, unfairly mischaracterizing the lawsuit and the interests of FAIR's members in the lawsuit, expose FAIR's members and their sister institutions to the loss of students, the anger of alumni, and the loss of donations.

c. If FAIR were forced to disclose its membership list publicly, the disclosure would defeat the very organizational purpose that FAIR was created to advance, the highly unpopular advocacy of a dissenting view of a Government policy. In fact, some would-be members of FAIR have declined to join precisely because they have been alerted to Government efforts to learn the identities of FAIR's members and they fear the exposure.

d. There are two exceptions among the membership: Golden Gate University School of Law (Golden Gate Law) and the Faculty of Whittier Law School (Whittier Law). Golden Gate Law is a member of FAIR. Golden Gate Law has a non-discrimination policy that denies the use of its career service office and facilities to discriminatory employers. Golden Gate Law applied this policy to the military as it applied the policy to all employers. In December 2001, Golden Gate Law was one of the two dozen law schools specifically targeted by DOD with a letter raising questions about whether Golden Gate Law was in compliance with the Solomon Amendment, and threatening a complete cut-off of federal funds if Golden Gate Law were found out of compliance. Subsequently, DOD, contrary to clear statutory language, threatened Golden Gate University with the loss of all federal funds, including student financial aid. Because of the threat, and for no other reason, in June 2003, Golden Gate Law suspended its policy with respect to the military, and now admits the military against its will onto its campus to participate in its recruiting job fair. Golden Gate Law believes that the assistance it provides to the military undermines the message it is trying to inculcate in its students and

interferes with the academic environment it has chosen to establish for the benefit of its students and faculty.

e. Whittier Law is a member of FAIR. The Whittier Law faculty voted overwhelmingly in 1989 to endorse a student-sponsored petition to ban military recruiters from on-campus recruitment, because the military did not abide by Whittier Law's statement of nondiscrimination as interpreted by the Whittier Law faculty and the law school's administration. The Whittier Law faculty extended its nondiscrimination policy to all forms of discrimination, including age, disability and sexual orientation. Following the vote, the director of career services promptly disinvited the military JAG representatives and removed all related recruiting materials from the career offices library shelves per this faculty direction. From the fall semester 1989 until the fall semester 2002, Whittier Law adopted the broadest interpretation of its policy to provide law school facilities only to those employers whose practices are consistent with Whittier Law's policy of non-discrimination. Military recruiters were not permitted to post recruiting information, speak at school-sponsored events, sit at tables, access student/alumni addresses, leave material visible in any library area, or interview on campus. If a student expressed interest in a military JAG career, the director of career services would refer the student to a recruiting office.

f. In 1999, when the Solomon Amendment placed Whittier student financial aid at risk, the Whittier Law faculty did not acquiesce, maintaining its resolution and the complete ban on military recruiting. In 2001, Whittier Law was one of the two dozen law schools specifically targeted by DOD with a letter raising questions about whether Whittier Law was in

compliance with the Solomon Amendment, and threatening a complete cutoff of federal funds if Whittier Law were found out of compliance. Whittier Law proposed several compromise plans to on—campus recruiting, including interview access at Whittier College itself.

g. Finally, on June 2002, because of the DOD's threat, counsel to Whittier College notified the military of the Law School's intent to accede to the military's demand for access for recruiting purposes. During the 2002-03 academic year, one May 2003 graduate was accepted to the Air Force JAG. This single offer, the first made since the on-campus interview ban was suspended, does not represent a statistically significant increase in hiring from the Whittier Law School student body. Whittier Law believes that the assistance it provides to the military undermines the message it is trying to inculcate in its students and interferes with the academic environment it has chosen to establish for the benefit of its students and faculty. At least one Whittier Law student believes that if the Law School is to comply with the Solomon Amendment, it should modify the non-discrimination policy to read that the law school should not assist any employer who discriminates "except those deemed worthy of discrimination by the federal government."

h. Every member of FAIR has autonomy to develop policies directed at enhancing its academic atmosphere and safeguarding its ability to recruit and retain diverse students. Every member of FAIR exercised that autonomy to adopt a policy that prohibits discrimination on the basis of, among other categories, sexual orientation. Every member of FAIR requires those employers who seek to use the law schools' career placement offices, facilities and re-

sources to abide by these non-discrimination policies. Every member of FAIR applies these non- discrimination policies to all employers, and has declined to make an exception for military recruiters. As a direct result of the Solomon Amendment, or the DOD's interpretation and application of the Solomon Amendment. every FAIR member has entirely suspended the application of its non-discrimination policy to military recruiters, including any symbolic gestures to signal its adherence to non-discrimination. Every member of FAIR believes that the suspension of its non-discrimination policy has compromised the message of non-discrimination that FAIR members previously sent to their communities and has undermined its efforts to provide its students and faculty with an atmosphere conducive to the free exchange of ideas.

i. Every member of FAIR joined the association pursuant to its customary protocols and policies, with whatever approvals and consultations the dean deemed organizationally necessary.

j. At least two members of FAIR had, for a period of time, barred military recruiters entirely from their campuses, voluntarily foregoing federal funds to the law schools themselves. Both were the targets of threats by the military not just to allow access, but to assist the military in the same ways that they assisted employers who did not discriminate. Both have complied, but only in response to direct threats from the military. One complied because the military threatened to cut off hundreds of millions of dollars in federal funding to the rest of the university. The other complied out of fear of being publicly vilified upon being listed in the Federal Register as non-compliant.

k. Every member of FAIR that did not bar military recruiters from campus found other methods of adhering to its non-discrimination policy as an expression of its stance against discrimination and in vindication of its right not to abet acts of discrimination, even while offering the military full access to its students. Several allowed military recruiters to recruit on campus, but refused to make appointments for them. Some allowed military recruiters to use university space—because their universities had less strict stances on non-discrimination—but not law school space. Most refused to let military recruiters participate in the formal job fairs sponsored by their schools. Each of these FAIR members has abandoned entirely these symbolic stances against discrimination in the face of the Solomon Amendment.

l. At least two of the FAIR members described in Paragraph 7(f), abandoned the practices described only after the military directly threatened them with a university-wide cutoff of all federal funds. Those who abandoned these practices without a direct threat from the military did so because they were aware of the threats directed at others. Every member of FAIR has come to believe over time that the military's position is that it must be treated exactly the same as any employer who does not discriminate, though the military never directly communicated this principle to most of FAIR's members.

m. Among the FAIR members (described in Paragraph 7(e)-(g)) who received direct threats by military personnel, not a single one was given clear directions as to exactly what the Solomon Amendment requires. None was given any formal process by which to

challenge the views of DOD officials that it was out of compliance.

8. Plaintiff The Society of American Law Teachers, Inc. ("SALT") is a New York corporation with almost 900 members. It is the largest membership organization of law faculty in the United States. Its members hail from 159 law schools in 44 states, including New Jersey, the District of Columbia, Puerto Rico and four foreign nations. It is committed to making the legal profession more inclusive and to extending the power of the law to underserved individuals and communities. Its members are law faculty who are ultimately responsible for the stewardship of the law school, and especially for advancing its mission to nurture future leaders and foster an environment conducive to respectful, open dialogue on fundamental issues of law and justice. SALT members consider the non-discrimination policies of their schools to be central to that mission and to their members' roles as law professors. SALT brings the claims in this lawsuit on behalf of its members.

a. The law schools where SALT members teach have implemented non discrimination policies, often times after they were promulgated by SALT members who comprise the faculty of the law schools. These policies prohibit discrimination on the basis of, among other categories, sexual orientation, disability and age. The SALT members and law schools apply these policies to employers who seek to use their career placement office facilities, resources and personnel. In the past, SALT members' law schools applied their non discrimination policies to the branches of the U.S. military that sought to recruit at the law schools.

b. The non-discrimination policies at SALT members' institutions are more than statements of principle. They allow SALT members to pursue scholarly goals and prepare their students for the practice of law in an atmosphere that encourages debate, celebrates diversity and promotes the ideals of respect and tolerance within their communities. The non-discrimination policies forcefully send a vital message of the values embraced by SALT members and SALT members' law schools to students, faculty, staff, and visitors.

c. SALT members are now precluded from enforcing their law schools' non- discrimination policies as they have traditionally done and, for those that were responsible for adopting the policies, as they intended. They cannot apply the policies to military recruiters because of the threat that they and the institutions with which they are affiliated will lose federal funds under the Solomon Amendment. SALT members' law schools would return to applying their non-discrimination policies to military recruiters if the Solomon Amendment were enjoined.

d. In addition, the Solomon Amendment, by forcing law schools at which SALT members teach and work to abandon their non-discrimination policies, interferes directly with the law schools' ability to create an atmosphere that encourages debate, celebrates diversity and promotes the ideals of respect and tolerance, and consequently, with SALT members' ability to benefit from the pedagogical environment that exists because of it.

e. SALT members are both beneficiaries and recipients of the messages of non- discrimination sent by the policies and they are harmed by their respective law schools' suspension of their non-discrimination

policies. They no longer benefit from the pedagogical environments created by the non-discrimination policies. These harms are ongoing and will continue until the Solomon Amendment is enjoined and SALT members' law schools can again apply their non-discrimination policies to military recruiters.

f. As for SALT members who developed, approved, and implemented their schools' non-discrimination policies, and thus were beneficiaries, senders, and recipients of the messages of non-discrimination sent by the policies, they are harmed by their respective law schools' suspension of their non-discrimination policies as they applied to the military because they cannot send or receive the message of non-discrimination free from interference caused by the Solomon Amendment. They too no longer enjoy the pedagogical environment fostered by the non-discrimination policy. These harms are ongoing and will continue until the Solomon Amendment is enjoined and SALT members' law schools can again apply their non-discrimination policies to military recruiters.

9. Plaintiff The Coalition for Equality ("CFE") is an association of students at Boston College Law School. Plaintiff Rutgers Gay and Lesbian Caucus ("RGLC") is an association of students at Rutgers University School of Law. They both are committed to furthering the rights and interests of all groups including gays and lesbians and bring this lawsuit on their members' behalf. Members of both associations are beneficiaries of law school policies directed at increasing diversity and inculcating values and fostering an environment in which respectful debate unfolds. Because of the Solomon Amendment, the rights of CFE's and RGLC's members to receive the educational mess-

ages sent by their respective law schools have been harmed.

Individual Plaintiffs

10. Plaintiffs Pam Nickisher, Leslie Fischer, Ph.D. and Michael Blauschild are students at Rutgers University School of Law (collectively, the "Student Plaintiffs"). Pam Nickisher and Michael Blauschild are residents of New Jersey. Leslie Fischer is a resident of Pennsylvania. As students, they are the beneficiaries of law school policies increasing diversity and directed at inculcating values and fostering an environment in which respectful debate unfolds. Because of the Solomon Amendment, the rights of the Student Plaintiffs to receive the educational messages sent by their law school have been harmed.

11. Plaintiff Erwin Chemerinsky is the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science, University of Southern California Law School, and Plaintiff Sylvia Law is the Elizabeth K.. Dollard Professor of Law, Medicine and Psychiatry at NYU Law School (collectively, the "Law Professor Plaintiffs"). As members of their respective law school faculties, the Law Professor Plaintiffs are beneficiaries, senders and recipients of the message of non-discrimination sent by USC's and NYU's non-discrimination policies. They are harmed by their law schools' suspension of their policies as applied to the military because they cannot send or receive the messages of non-discrimination free from interference cause by the Solomon Amendment. This harm is ongoing and will continue until the Solomon Amendment is enjoined.

Defendants

12. Defendant Donald Rumsfeld, the United States Secretary of Defense, heads the DOD, which oversees the United States Armed Forces. The Secretary of Defense is responsible for the formulation and execution of defense policy. DOD is the nation's largest employer, with 1.4 million men and women on active duty, another 1.2 million serving the Reserve and Guard components, and more than 650,000 civilians. DOD also makes available an estimated $1 billion in grants plus billions more in federal contracts every year to institutions of higher education.

13. DOD is responsible for the implementation of the Solomon Amendment. Specifically, DOD makes the ultimate determination whether an institution of higher education is in compliance with the Solomon Amendment. When DoD determines that a school is in violation, it first threatens to cut off grants and contracts to that school. Then, if not satisfied with an institution's compliance, it cuts off those grants and contracts and notifies other agencies that are, in turn, obliged to do the same.

14. Defendant Rod Paige is the United States Secretary of Education. Under his direction, the Department of Education makes available an estimated $3 billion in grants plus millions more in federal contracts every year to institutions of higher education covered by the Solomon Amendment.

15. Defendant Elaine Chao is the United States Secretary of Labor. Under her direction, the Department of Labor ("DOL") makes available monies in the form of grants and federal contracts each year to insti-

tutions of higher education covered by the Solomon Amendment.

16. Defendant Tommy Thompson is the United States Secretary of Health and Human Services. Under his direction, the Department of Health and Human Services ("HHS") makes available an estimated $12 billion in grants plus millions more in federal contracts every year to institutions of higher education covered by the Solomon Amendment.

17. Defendant Norman Mineta is the United States Secretary of Transportation. Under his direction, the Department of Transportation ("DOT") makes available monies in the form of grants and federal contracts each year to institutions of higher education covered by the Solomon Amendment.

18. Defendant Tom Ridge is the United States Secretary of Homeland Security. Under his direction, the Department of Homeland Security makes available monies in the form of grants and federal contracts each year to institutions of higher education covered by the Solomon Amendment.

FACTS

Law School Mission

19. Law schools are not merely vocational schools that churn out lawyers so that they can pass bar exams, draft briefs and close deals. Law schools aspire to train the next generation of leaders to pursue justice, respect the rule of law, and stand by principle.

20. Law schools have determined that diversity in their faculty and students is an essential precondition to this mission, both because the society these future lawyers will enter, and hopefully lead, is not monochroma-

tic, and because discourse is richer in communities full of varied backgrounds, perspectives, and experiences.

21. Diversity serves no purpose if students and faculty feel inhibited from engaging in discourse. Thus, law schools have promoted, demanded, and strictly enforced, not merely diversity, but also tolerance and respect. Law schools nurture environments in which students are welcome to present their views, their ideas, and beliefs. Key to this environment, and key to their mission, therefore, is an uncompromising adherence to the principle that all who engage in discourse within the law school community are fully equal. Judgments based solely on race, creed, color, religion, gender, national origin, or sexual orientation have no place in the law school environment. They have no place because they undermine the law school's mission.

Non-Discrimination Policies

22. The message of diversity and tolerance is communicated by law schools through their faculty, their curriculum, and their policies. Almost every accredited American law school has adopted a non-discrimination policy. The words may vary but the content and the message communicated is the same:

> [The] Law School is committed to a policy against discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment), marital, parental or veteran status, or sexual orientation.

23. Law schools admit students, grant scholarships, grade exams, recruit and promote faculty, and hire staff in light of these principles. In furtherance of the policies, law schools also follow recruiting policies:

They refuse to assist any recruiter who discriminates on the basis of characteristics unrelated to merit. Some have refused even to allow such recruiters on campus to recruit.

24. In so doing, the school conveys a message that law school personnel will not abet the discriminating employer's recruiting efforts. To do otherwise is antithetical to both the law schools' message and mission. This policy has substantive pedagogical value by pronouncing values that students do not necessarily learn from casebooks and lectures, values that law faculty hope students will internalize, and the policy reifies those values, modeling behavior that it hopes its students will follow in their law practices and lives as community leaders.

25. In the law school's judgment, this policy also helps nurture the sort of environment for free and open discourse that is the hallmark of the academy.

26. Law schools apply this policy even-handedly to all employers. Any employer who discriminates forfeits law school assistance in recruiting and might even be excluded from recruiting on campus. Students are free to seek jobs with employers that discriminate. However, they must do so without the law school's active support of that employer, and at times must do so without the law school's active support of that employer, and at times must do so off campus.

27. Because law schools applied their non-discrimination policies even-handedly, no exception was made for the military and its discriminatory policy regarding sexual orientation. Their motive has been neither to punish the military nor to undermine military recruitment. They sought to adhere to a principle that has

long motivated the academy and to maintain the open, respectful academic environment they aspire to nurture.

The Solomon Amendment

28. In 1995, Congress responded to the non-discrimination policies of educational institutions by passing the Solomon Amendment, named for its sponsor, Representative Gerald Solomon of New York. Among the purposes of the amendment, according to a congressional supporter of the legislation, was to "send a message over the wall of the ivory tower of higher education." 140 Cong. Rec. 11,441 (1994). The amendment, which has become increasingly strict over the years in language and interpretation, currently covers funds allocated in two broad appropriations measures—one for the Departments of Defense and Transportation, and the other embracing the Departments of Labor, Health and Human Services, and Education, and related agencies. In its current incarnation, the Solomon Amendment provides that none of the funds in those two appropriations measures:

> may be provided by contract or by grant (including a grant of funds to be available for student aid) to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents
>
> (1) the Secretary of a military department or Secretary of Transportation from gaining entry to campuses, or access to students. . . on campuses, for purposes of military recruiting; or

> (2) access by military recruiters for purposes of military recruiting to. . . information pertaining to students . . . enrolled at that institution (or any subelement of that institution) . . .

10 U.S.C. § 983(b). The Solomon Amendment also now applies to funds from the Department of Homeland Security. Pub. L. No. 107-296, Title XVII, § 1704(b)(I),(g), Nov. 25, 2002, 116 Stat. 2314, 2316.

29. The statute and implementing regulations effectively make the funding restriction provisions of the Solomon Amendment applicable only to those law schools that ban or restrict the military from recruiting as an expression of protest of the military's discriminatory hiring practices. Schools that ban the military from recruiting for other reasons are not subject to the provisions of the Solomon Amendment.

30. Under the terms of the Solomon Amendment, the funding prohibition is triggered only when an institution has a policy or practice that "prohibits, or in effect prevents" military recruiters from "gaining entry to campuses or access to students . . . on campuses" or access to "information pertaining to students." 10 U.S.C. § 983(b). DOD regulations promulgated under the statute exempt some schools that do not "provid[e] requested access" so long as they can demonstrate "that the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers." 32 C.F.R. § 216.4(c)(3).

31. The Solomon Amendment authorizes the Secretary of Defense to issue regulations prescribing procedures for determining whether an educational institution has a policy of denying or preventing access to students on campus or to information. According to

DOD, once it determines that an institution has violated the Solomon Amendment, the institution is no longer eligible for most funds administered by the Departments of Defense, Transportation, Labor, Health and Human Services, Education, Homeland Security, and related agencies. 10 U.S.C. § 983(d)(2).

32. In implementing the regulations, the DOD has taken inconsistent positions, and its current position is internally contradictory, particularly in regard to the statutory language about "subelements." DOD initially read the language to mean that only the sub element of a school that violated the Solomon Amendment would be punished. 63 Fed. Reg. 56,819 (Mar. 29, 1997). Without notice or comment, however, DOD amended its regulations to eliminate the subelement limitation from regulations governing its own funds, 65 Fed. Reg. 2056 (Jan. 13, 2000), but kept it in place as applied to the funds of other agencies, *see* 32 C.F.R § 216.

33. Under DOD's current reading of the law, upon its determination that any subelement of an institution of higher education is in violation of the Solomon Amendment, the Defendants are all required to stop payment on virtually all of their grants and contracts to the entire school and to award them no further grants or contracts.

Efforts to Comply With the Solomon Amendment

34. Virtually none of the law schools in the nation have barred military recruiters from campus although a handful have. What many did, however, was to develop devices to adhere to their non-discrimination policies even while ensuring full military access to interested students. Some did not let law school personnel arrange student interviews, but relegated the task to

career services professionals from somewhere else at the university. Others would allow military recruiters on campus by invitation of any student or student group-and would make facilities available to them-but would not match students to recruiters or post military literature.

35. The military was still inundated with many more highly talented lawyers than it could accommodate. As one recruiter remarked, "Competition has been very keen in the past few years for both our intern and JAG attorney positions. Unfortunately, that means some very qualified applicants will not be selected for a position."

36. Lately, however, DOD, or officers of various branches of the military, has begun threatening law schools with a cutoff of federal funds for alleged violations of the Solomon Amendment. And the military has demanded more than just access. It has demanded the law schools' active participation in military recruiting. Typically, the military has communicated the demand not by specifying what the law school has done wrong. Rather, the military merely has declared that the law school is in default and that all federal funds will be cut off if the law school does not come into compliance.

37. Some law schools responded by requesting from DOD a clear statement of what it believes the law requires. DOD has consistently refused to offer concrete guidance, replying only that the inquiring school remains in default.

38. When law schools asked the complaining military officials how they could obtain review of their recruiting policies without risking suspension of federal

monies, the typical response was that there was no review. In other words, the military officials claimed that the law school had to risk losing all of its federal monies before it could obtain DOD review. Review could be had only once the military determined that the law school was out of compliance, DOD recommended the suspension of funds, and funds were suspended.

39. The recruiting policies of law schools have no discernable impact on the military's ability to recruit, as the military was more than able to meet its JAG Corps recruiting needs before law schools began to suspend their non-discrimination policies. A law school's decision not to volunteer law school staff to help the military recruit is therefore entirely expressive in purpose and effect.

40. After nearly 18 months of exchanges between the military and various law schools, and in direct response to the threats of the military, as of the 2003 fall recruiting season, every law school in the nation that receives federal funds has permanently suspended the application of its non-discrimination recruiting policy to the military. As a result, law schools' statements of dissent and protest are being suppressed, and law schools are being forced to endorse, or appear to endorse, the military's discriminatory hiring policy-a message that is repugnant to them.

41. The injury to law schools, law faculties, and law students is constant and irreparable. Most law schools host employers officially in the fall and the spring, but their efforts on behalf of employers are perpetual. Before the last employer leaves campus in the fall, law school career services personnel begin to collect and disseminate the literature of employers who will be arriving in the late winter and early spring. In order to

accommodate the military's demands for a spring recruiting cycle, law school personnel must begin making arrangements and organizing appointments far in advance. Thus, even as one recruiting season ends, the next begins, and the military's insistence on parity with non-discriminating employers means that throughout the year, it is demanding that law schools perform functions that the law schools would refuse to perform but for the threat of the Solomon Amendment.

CAUSES OF ACTION

Count I: Statutory Construction

42. The allegations of ¶¶1-39 of this Complaint are incorporated and re-pled.

43. The Defendants have misread and misapplied the plain terms of the Solomon Amendment and the regulations promulgated thereunder: (A) by demanding that law schools do more than permit "entry to campuses, or access to students . . . on campuses, for the purposes of military recruiting;" (B) by incorrectly interpreting the statute and the regulations to require that a law school offer military recruiters every service and accommodation given to employers who satisfy the law school's non-discrimination policy; and (C) by interpreting the Solomon Amendment to permit a university-wide funding freeze just because of a law school's purported non-compliance.

44. As a result of the military's misreading and misapplication of the Solomon Amendment and its implementing regulations, the Plaintiffs and their members have been and continue to be irreparably harmed.

Count II: Unconstitutional Conditions

45. The allegations of ¶¶ 1-42 of this Complaint are incorporated and re-pled.

46. The Solomon Amendment and regulations promulgated thereunder violate the rights of Plaintiffs (and/or of Plaintiffs' members) under the First Amendment to the Constitution of the United States, by imposing an unconstitutional condition on the receipt of federal funding, thereby impinging on Plaintiffs' academic freedom, freedom of speech, and freedom to associate with one another in pursuit of common objectives.

Count III: Viewpoint Discrimination

47. The allegations of ¶¶ 1-44 of this Complaint are incorporated and re-pled.

48. The Solomon Amendment, as written and implemented, constitutes impermissible viewpoint discrimination in violation of the First Amendment to the Constitution of the United States in that its funding restrictions apply only to law schools and other institutions that ban or restrict military recruiters in protest. Law schools and other institutions that exclude military recruiters for other reasons are not affected by the Solomon Amendment's funding restriction provisions.

49. Because the Solomon Amendment is viewpoint-based, it is presumptively unconstitutional and the military cannot rebut this presumption. The constitutional rights of Plaintiffs (and/or Plaintiffs' members) therefore have been, and continue to be, irreparably harmed.

Count IV: Compelled Speech/Suppressed Dissent

50. The allegations of ¶¶ 1-47 of this Complaint are incorporated and re-pled.

51. The Solomon Amendment impermissibly prohibits the Plaintiffs (and/or Plaintiffs' members) from expressing dissent by cutting off critical federal funding to law schools that express their protest of and objection to the military's discriminatory hiring and personnel policies and by exposing allegedly non-compliant schools to public censure by identifying them in the Federal Register. The Solomon Amendment forces the Plaintiffs (and/or Plaintiffs' members) to express and subsidize a message of support for military, even though they abhor the military's discriminatory hiring decisions.

52. The constitutional rights of Plaintiffs (and/or of Plaintiffs' members) to express dissent and to be free from compelled endorsement of messages repugnant to them therefore have been, and continue to be, irreparably harmed.

Count V: Void for Vagueness/Overbreadth

53. The allegations of ¶¶ 1-50 of this Complaint are incorporated and re-pled.

54. The Solomon Amendment is unconstitutionally vague and/or overbroad and thus void under the First Amendment and the Due Process Clause of the Fifth Amendment of the Constitution of the- United States, in that it restricts a wide range of speech and associational activities protected under the First Amendment, lacks sufficient definitions or guidance regarding its application, grants unfettered discretion to DOD and low-level military officers to decide what constitutes compliance, and impermissibly chills the speech of Plaintiffs (and/or Plaintiffs' members).

55. The operative language of the statute and its implementing regulations are so vague that persons of

common intelligence must necessarily guess at their meaning and differ as to their application. Moreover, the DOD, as the enforcing agency, has not only refused to clarify its interpretation of the statute or the regulations, but, through various recruiters and officers, also has given numerous conflicting interpretations to the statute and regulations. As a result, the constitutional rights of Plaintiffs (and/or Plaintiffs' members) have been, and continue to be, irreparably harmed.

Count VI: Due Process

56. The allegations of ¶¶ 1-53 of this Complaint are incorporated and re-pled.

57. The Defendants, by refusing to provide the university or the law school with the reason or reasons that the university is in violation of the Solomon Amendment, and by finding the university in violation without giving the university an opportunity to be heard, have violated the Plaintiffs' (and/or Plaintiffs' members') right to due process under the Fifth Amendment to the United States Constitution.

Count VII: Violations of the Administrative Procedure Act

58. The allegations of ¶¶ 1-55 of this Complaint are incorporated and re-pled.

59. The DOD's elimination of the subelement limitation from the regulations governing its own funds without notice or comment period violated the provisions of the Administrative Procedure Act. 5 U.S.C. § 551, et. seq.

60. The DOD's failure to provide law schools with reasoned and supported explanations of how the law schools allegedly had failed to comply with the Solomon

Amendment violated the Administrative Procedure Act. 5 U.S.C. § 551, et seq.

61. The DOD's violations of the Administrative Procedure Act have caused and continue to cause irreparable harm to the Plaintiffs (and/or Plaintiffs' members).

* * * * *

62. The Plaintiffs have no adequate remedy at law for any of these violations.

* * * * *

WHEREFORE, Plaintiffs respectfully request the Court to:

(1) Declare pursuant to 28 U.S.C. § 2201 that, as a matter of statutory construction, law schools have no obligation under the Solomon Amendment to do anything other than allow military recruiters to enter the campus in order to recruit, without expecting any support or other involvement from the law school;

(2) Declare pursuant to 28 U.S.C § 2201 that the Solomon Amendment—even when limited to a directive to allow the military on campus to recruit—violates the First an Fifth Amendments to the Constitution of the United States;

(3) Declare pursuant to 28 U.S.C. § 2201 that the Defendants have violated the provisions of the Administrative Procedures Act in their interpretation and implementation of the Solomon Amendment;

(4) Grant appropriate preliminary, and final, equitable relief enjoining the Defendants from enforcing the Solomon Amendment, including but not limited to, declaring law schools ineligible for federal grants or contracts, recommending ineligibility to the Principal Deputy Under Secretary of Defense for Personnel

Readiness or any other DOD official, listing schools in the Federal Register as institutions that are not in compliance with the Solomon Amendment, or notifying any of the other Defendants or any related federal agency of such ineligibility for the purposes of terminating grants or contracts under the Solomon Amendment;

(5) Award reasonable attorneys fees and costs pursuant to 28 U.S.C. § 2412; and

(6) Grant such other and further relief as the Court deems proper.

Dated: October 14, 2003 Respectfully submitted,

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EXCERPTS OF APPLETON AND TOKARZ DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ____

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICA LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, DEFENDANTS

DECLARATION OF SUSAN APPLETON AND KAREN TOKARZ

I, Susan Appleton, declare pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Lemma Barkeloo and Phoebe Couzins Professor of Law and former Associate Dean of Faculty at Washington University School of Law. I have taught at Washington University School of Law since 1975 and served as the Associate Dean of Faculty from 1998 until 2003. If called as a witness, I could and would testify to the following based on personal knowledge or on information and belief.

I, Karen Tokarz, declare pursuant to 28 U.S.C. § 1746, as follows:

2. I am a Professor of Law and the Director of Clinical Education at Washington University School of Law. I have taught at Washington University School of Law since 1979 and have been the Director of Clinical

Education since 1980. If called as a witness, I could and would testify to the following based on personal knowledge or on information and belief.

We, Susan Appleton and Karen Tokarz, declare pursuant to 28 U.S.C. § 1746, as follows:

3. Washington University School of Law has a long-standing commitment to diversity and nondiscrimination, dating back to the earliest days of the school. In 1869, only two years after opening its doors, the School admitted its first woman student. Washington University is believed to be the first law school (certainly among the first law schools) in the nation to admit women students. The School admitted its first student of color in 1883. In the early 1970's, explicit affirmative action programs designed to recruit and retain underrepresented minorities, primarily African-Americans but also underprivileged whites, enhanced the diversity of the student body. Even before federal legislation required equal access, students with disabilities were admitted to the School of Law, including students with visual impairments and hearing impairments as well as those requiring the assistance of wheelchairs.

Diversity, tolerance, and respect are hallmarks of the Washington University School of Law community. * * *.

4. Both Washington University and the School of Law expressly endorse and communicate their policies of non-discrimination. Both policies include sexual orientation as a prohibited basis for discrimination. The published University policy reads:

> Washington University encourages and gives full consideration to all applicants for admission, financial aid, and employment. The University does not

> discriminate in access to, or treatment or employment in, its programs and activities on the basis of race, color, age, religion, sex, *sexual orientation*, national origin, veteran status, or disability.

See Exhibit 1.

5. The School of Law Faculty Rules were amended in May 1990 to add sexual orientation, religion, national origin and age to prior explicitly prohibited classifications of race, sex, and handicap, in order to conform this policy to the broad non-discrimination provisions published in the School of Law Admissions literature.

> Faculty are prohibited from discriminating against students on grounds of race, color, religion, national origin, sex, handicap or disability, age, or *sexual orientation* (Faculty Rule (K) 1).

See Exhibit 2.

6. Per the Faculty Rules, the School of Law Career Services Office since May 1990 has required all prospective employers seeking to use the Career Services Office facilities to sign a written assurance of non-discrimination and the School has applied this policy even-handedly to all employers. The policy does not prevent discriminatory employers from contacting students, nor is the goal to dissuade students from seeking jobs with those employers. Rather, the goal is expressive—to communicate to students, faculty, and staff that the School will treat all students equally and will not compromise on its non-discrimination policy. The School of Law policy reads:

> Washington University School of Law is committed to a policy of equal opportunity for all students and graduates. The Career Services facilities of this

> school shall not be available to those employers who discriminate on the grounds of race, color, religion, national origin, sex, handicap or disability, age, or *sexual orientation.* For purposes of this rule, the posting of employment notices on any bulletin boards designated for official law school business, or the posting or distribution of such notices by the law school administration elsewhere in the law school building, shall be considered making Career Services facilities available. Before using any of the Career Services interviewing facilities of this school, an employer shall be required to submit a signed statement certifying that its practices conform to this policy (Faculty Rule (K) 3).

See Exhibit 3.

7. In 1990, the Association of American Law Schools required its member schools to insist that employers who seek to use a law school's career services offices provide written assurance that they will not discriminate against student applicants based upon sexual orientation or any other protected category. In 1995, Congress enacted the Solomon Amendment, denying Department of Defense funding to institutions of higher education that prevented the military from recruiting on campus. In 1997, Congress extended the rule denying federal funds to universities and sub-elements of universities that denied access to military recruiters to grants and contracts provided by the Departments of Labor, Health and Human Services, Education, and Transportation.

8. From 1990 to 1997, the Washington University School of Law did not allow any employers who refused to sign the non-discrimination assurance use of the Career Services Office facilities. When a military re-

cruiter signed the required assurance of non-discrimination, as the U.S. Army did prior to 1997, such recruiters were allowed to use the School of Law Career Services Office facilities. From 1996 to 2001, in response to the enactment of the Solomon Amendment, the School of Law Career Services Office allowed military recruiters who refused to sign the assurance (but not other employers who did not sign) to send out e-mail on the student list serve. The ROTC Department scheduled interviews on campus at the ROTC Building.

9. On January 13, 2000, the Department of Defense adopted interim regulations, effective immediately, to define an institution of higher education to include all sub-elements of such an institution, thus eliminating the pre-existing policy that treated schools and colleges within a university as independent actors for purposes of determining whether financial sanctions would be applied to universities at which one school or college excluded military recruiters.

10. In September 2000, the School of Law Career Services Office received letters and/or calls from U.S. Army, Navy, and Air Force recruiting officers stating their interest in recruiting Washington University law students at the School of Law, not at the ROTC Building. The Career Services Office initially responded that it preferred to continue the past practice of using the ROTC Building. The representatives of the military advised they would report the School to their superiors for violating the Solomon Amendment and represented that failure to comply with their requests would place Washington University federal grants and other funding at risk.

11. In response to these new demands from the military and the conflict with the School of Law's ex-

plicit non-discrimination policy, Joel Seligman, Dean of the School of Law, held an open forum on October 25, 2000 for faculty, students and staff. A large number of students and faculty, before and at that meeting, expressed deep concerns about the possible suspension of the School of Law's non-discrimination policy for military employers only.

12. On November 7, 2000, Mark S. Wrighton, Chancellor of Washington University, instructed the Law School to allow the military access to Career Services Office on-campus recruiting facilities. Chancellor Wrighton requested that the School of Law "except the Department of Defense's military recruiting programs from [the School of Law] policy of having to affirm that they do not discriminate on the basis of sexual orientation." He acknowledged that "[t]his action . . . will cause pain among members of the gay and lesbian community."

See Exhibit 4.

13. On November 8, 2000, Joel Seligman, the Dean of the School of Law, advised faculty, students, and staff that the School of Law would allow military recruiters access to the facilities of the Career Services Office, "while this [DOD interim] regulation remains in effect . . . because of the extraordinary impact a prohibition of recruitment would have on other schools throughout our University." He said, "For many of us, a policy of non-discrimination on the basis of sexual orientation reflects a fundamental moral value," and he acknowledged "how much pain will result from this action."

See Exhibit 5.

14. On November 8, 2000, 45 members of the Law School Faculty and Administration signed an open

letter endorsing the University and School of Law non-discrimination policies and expressing concerns about the impending suspension of the policy for the military, an employer which openly discriminates against gays and lesbian student applicants. The Faculty Statement reads:

> The undersigned members of the faculty and administration of Washington University School of Law write to reaffirm our support for the University and School of Law policies prohibiting discrimination based on sexual orientation and the School of Law policy barring discriminatory recruiters. We also wish to share our concerns regarding the temporary suspension of the policy as to military recruiters. We deplore the military policy that requires this suspension. *It compromises our longstanding conception of the academic freedom of a faculty of law to determine appropriate ethical standards for the recruitment of our students and conscripts us into complicity with policies that unjustly degrade fellow persons* [emphasis added]. All our collective experience with struggles for elementary justice under law suggests now, as much as ever, our ethical need to resist familiar attempts to divide people of good will from a sense of their common humanity.

See Exhibit 6.

15. On November 8, 2000, OUTLAW (the School of Law LGBT student organization) sent a letter to the Faculty and the Administration questioning the institution's commitment to non- discrimination when it allows exceptions to the non-discrimination policy, and expressing concern that such action conveys "school-

sanctioned prejudice" against gay, lesbian, bisexual, and transgendered students. The letter reads, in part:

> The law school should not yield in its goal of attaining a nurturing educational environment where all members of our community are treated equally without fear of persecution . . . As the representatives of law and justice on this campus, the School of Law has a unique duty and opportunity to uphold the policy it has adopted with regard to discriminatory hiring practices. *The reasoning is clear: an unenforced policy is not a policy.* The words of the policy on discrimination embody strong principles that are highly valued by the Washington University School of Law community. *A failure to enforce these principles reduces the policy to mere rhetoric.*
>
> If we do not stand by our position, we send the message that, although the school has knowingly admitted gay, lesbian, bisexual and transgendered students, these groups have no protection here. This means they cannot enjoy the same benefits as other students and are subject to school-sanctioned prejudice.
>
> Lawyers, historically the protectors of civil liberties, have a special obligation to uphold the principles of equality. This decisions offers [the School of Law] an opportunity to remain consistent with the promise made to us when we came to Washington University, that "we do not discriminate here, nor do we tolerate those who do."

See Exhibit 7.

* * * * *

17. On February 23, 2001, for the first time in over 10 years, Washington University School of Law suspended its non-discrimination policy and permitted access to the facilities of the Law School Career Services Office to an employer who refused to sign the non-discrimination assurance. The U.S. Army, Air Force, and Navy sent representatives to conduct interviews in the Law School building, as part of the Career Service Office's spring on campus interview program.

18. At the time of that visit (and subsequent visits) the Law School posted ameliorative statements outside the Career Services Office advising that the military had not signed the non-discrimination assurance that the Law School requires of all employers using its services. The ameliorative statement also was posted at the doorways to the building and outside the interview rooms. Since then, each time that the military recruiters visit campus or post job information, the Law School posts such ameliorative statements.

See Exhibit 9.

19. At the time of that first visit (and subsequent visits), many oppositional posters were hung by students and faculty throughout the building and a large protest was held at which students, faculty, and administrators participated. Following the protest a video was created of the protest. Copies of these posters are attached at Exhibit 10.

20. At that first recruiting session on February 23, 2001, some student protestors who opposed the military's presence on campus signed up for and attended interviews. Some gay students who desired to work for the Department of Defense also signed up for and

attended interviews. Kevin Linder, WU '01, a former ROTC student at Princeton who has wanted to be an officer in the JAG Corps since high school, interviewed and admitted to the recruiter that he was gay. At the protest, Linder said that the recruiter advised him that he (Linder) was ineligible due to his sexual orientation. Linder told the audience,

> [Even though I am now out about my sexuality,] I am the same person. I still want to be an officer. I still want to be an attorney. I still want to be a JAG Corps attorney. . . . I really, really felt the sting of overt discrimination aimed at me. When JAG was invited, when they forced themselves on campus, I felt that it was offensive. And I didn't really think that they should be able to come here without a fight.

21. Thomas J. Hill, WU '03, President of OUTLAW, also spoke (and cried) at the February 23, 2001 protest. He said, "I came to this school pursuing a dream of equality and justice and what that meant in our society. I thought I'd be fighting for the other person. Now, I find myself fighting the fight firsthand. Unfortunately, here and now my dignity has been jeopardized."

22. Ebony Woods, WU '03, President of BLSA, also spoke at the February 2001 protest, as did Professor Kimberly Norwood. Norwood said, "It is unbelievable that we are allowing these people into our home, into our place of justice. It is particularly painful for me because the very reason that the military gives for discriminating is the very reason that they used decades ago to keep African-Americans out."

23. Patavee Vanadilok, WU '01, President of the Student Bar Association, also spoke at the February 23,

2001 protest. She bemoaned that students have come to believe that the School is not in fact committed to non-discrimination and that hate speech and other forms of discrimination against gay and lesbian students and faculty will be tolerated by the School of Law. She said, "[T]he dark side of this community has been unleashed [in recent weeks]. It is because blatant and open forms of prejudice and hostility exist at the WU School of Law that we should support this vigil and protest against the suspension of this school's non-discrimination policy."

24. In Fall 2001, Spring 2002, Fall 2002, and Spring 2003, the U.S. military conducted interviews through the Career Services Office, although the School required that the interviews be conducted outside the Law School in an adjoining building which some other employers also used.

25. Further protests/vigils have been held on each occasion of visits by military recruiters (but for Fall 2001, due to events of September 11, 2001) featuring nationally prominent speakers such as Professor Sylvia Law (NYU), Professor Chai Feldblum (Georgetown), and Professor Aaron Belkin (University of California, Santa Barbara).

26. The Faculty Statement has been republished each year, most recently in March 2003, as the Law School has been forced to suspend its non-discrimination policy and permit military recruiters to use the Career Services facilities to recruit law students on campus, in

response to the University's continuing concern that the Department of Defense will interfere with the entire University's federal funds.

* * * * *

EXHIBIT 5 TO APPLETON & TOKARZ DECLARATION

Memo From the Dean

MEMO FROM THE DEAN

To: Faculty, Students, and Staff

From: Joel Seligman

Date: November 8, 2000

Subject: Military Recruiters on Campus

This academic year, for the first time since this School adopted a policy prohibiting discrimination based on sexual orientation, an employer who openly discriminates against gay and lesbian people will be allowed access to the facilities of the School of Law's Career Services Office.

Both our University and the School of Law have adopted a policy of nondiscrimination on the basis of sexual orientation. The School of Law policy, which specifically applies to Career Services and which will otherwise remain in effect states that these facilities "shall not be available to those employers who discriminate on the grounds of race, color, religion, national origin, sex, handicap or disability, age, or sexual orientation." Our policy further states that employers who wish to use the Career Services Office are required to sign a statement certifying that their practices conform to our policy. The United States military currently discriminates in its hiring and employment on the basis of sexual orientation. As a result we have not allowed the military to use the Career Services

facilities to recruit our law students. In recent years, the Army JAG Corps has used our public lists serve to invite students to interview with them at the campus ROTC building.

Earlier this year, the Department of Defense adopted an interim regulation which removed the "unit exception" from the application of the Solomon Amendment. The Solomon Amendment was enacted by Congress in 1995 to withhold specified federal funds from law schools that denied military recruiters access to their campuses. The removal of the "unit exception" means that our law school's continued refusal to allow military recruiters to use the Career Service Office would place in jeopardy federal grants to other schools throughout our University, including grants from Health and Human Services, but not including student financial assistance.

After discussion with Chancellor Mark Wrighton it is clear that the law school will not be able to enforce its nondiscrimination policy against the military while this regulation remains in effect. Our School, like virtually every other law school in this country, will be required to permit the military to recruit while the Department of Defense Regulation remains in effect.

It is also clear, after meeting with interested students and faculty on Wednesday, October 25; reviewing the results of a student referendum; and receiving a large number of communications on the subject, how much pain will result from this action. For many of us, a policy of nondiscrimination on the basis of sexual orientation reflects a fundamental moral value.

The decision to permit military recruitment does not reduce our faculty's administrators, or students com-

mitment to the goal of nondiscrimination on the basis of sexual orientation. This School will continue to support reasonable ameliorative efforts to signify our commitment to this goal.

The decision, nonetheless, to permit military recruiters on campus is necessary because of the extraordinary impact a prohibition of recruitment would have on other schools throughout our University. It trivializes this impact to say that this is just about money. At issue potentially are careers, the education of students, residents, interns, and fellows; patient care; and potentially cures to devastating diseases.

The Association of American Law Schools (AALS) Accreditation Standards require that this School of Law take steps to ameliorate the damage to those protected by our nondiscrimination policy. I will request that the Career Services Office place notices recognizing that the military recruitment practices are inconsistent with our School's nondiscrimination policy. The School of Law is attempting to organize a meeting with Professor Sylvia Law of New York University Law School in January 2001 to discuss why the military policy is wrong and national efforts at amelioration.

The AALS, joined by other educational organizations, has submitted comments to the Department of Defense arguing that the interim regulations are illegal. These regulations were adopted on an emergency basis without complying with the Administrative Procedure Act, which ordinarily requires federal agencies to provide notice of proposed rulemaking and an opportunity for public comments and a statement of the basis and purpose for the rule. Second, the language of the committee reports concerning the current Department of Defense appropriation may not provide an

adequate basis for the Regulation's revision of the long accepted understanding of the earlier Solomon Act. This School of Law will explore with others in American legal education whether the new regulations might be challenged as illegal and how the School of law might contribute to such an effort.

EXHIBIT 7 TO APPLETON AND TOKARZ DECLARATION

TO: The Faculty of The School of Law
FROM: OUTLAW
RE: Military Recruiters on Campus
DATE: November 8, 2000

More than ten years ago, this law school's faculty adopted a policy of non-discrimination based on sexual orientation. Ironically, when the need for this non-discrimination policy finally arises, our community may abandon it in favor of the discriminatory hiring practices of the United States Military. The threat is asserted under penalty of losing a considerable amount of Federal funding to the School of Medicine. We are being asked to abandon our policy on discrimination in the School of Law in favor of the monetary gain to Washington University. The law school should not yield in its goal of attaining a nurturing education environment where all members of our community are treated equally without fear of persecution. The law school, as a proactive force advocating against discrimination, should not permit military recruiters' use of law school facilities to promote policies which discriminate against sexual minorities. OUTLAW is asking that our law school community persevere in its activism and challenge the continuing invidious discrimination against minorities.

Despite the universal Policy on Discrimination shared by all departments and programs at Washington University, military recruiters are still permitted to engage in discriminatory recruiting activities on this campus. As the representatives of law and justice on

this campus, the School of Law has a unique duty and opportunity to uphold the policy it has adopted with regard to discriminatory hiring practices. The reasoning is clear: an unenforced policy is not a policy. The words of the Policy on Discrimination embody strong principles that are highly valued by the Washington University community. A failure to enforce these principles reduces the policy mere rhetoric. In order to give meaning to the Policy on Discrimination, the military must not be allowed to reassert its discriminatory policies on our campus. Because the main purpose of our non-discrimination policy as it effects the law school community concerns employment recruiting, if we do not oppose the use of our facility for military recruiting, our actions effectively negate the "sexual orientation" clause of the non-discrimination policy altogether. As members of the legal community, we should understand the negative effect that failure to uphold this policy would have on our community at large.

In the interest of further distinguishing Washington University School of Law as a progressive and leading law school, it is now time to take a stand. * * *.

If we do not stand by our position, we send the message that, although the school has knowingly admitted gay, lesbian, bisexual and transgendered students, these groups have no protection here. This means they cannot enjoy the same benefits as other students and are subject to school-sanctioned prejudice. The law school has two options: welcome gay students and ensure their equality on campus, or inform them of their unfair treatment they can expect at Washington University.

OUTLAW believes that the law school cannot afford to compromise on this critical issue, even at great cost

to the University. Although the ultimate choice of disallowing military recruiting in our building lies with Chancellor of the University, a decision by the law school to exclude military recruiters from our facilities would send a clear message to the University community and the public at large. This decision would be an unequivocal declaration that the military's hiring practices are inappropriate and unjust. Lawyers, historically the protectors of civil liberties, have a special obligation to uphold the principles of equality. This decision offers an opportunity to remain consistent with the promise made to us when we came to this school that, "we do not discriminate here, nor do we tolerate those that do." This message, from a respected body of learning, might lead legislators to see that the ideology supporting discriminatory policies is unacceptable.

OUTLAW, therefore, asks for your vote in upholding our current Policy on Discrimination. We require more than the "ameliorative measures" prescribed by AALS in reconciling this injustice because they fail to address our deepest concern. In order to ensure continued equality for all students at Washington University, OUTLAW suggests that we unite and continue to prohibit military recruiting in the law school. The spirit of the law and the principles of justice are simply to valuable to sacrifice in the name of bureaucracy or money.

EXHIBIT 8 TO APPELTON & TOKARZ DECLARATION

STUDENT BAR ASSOCIATION'S (SBA) RESOLUTION

In a special Session on Wednesday, February 21, 2001, the Student Bar Association passed the following Resolution by a vote of 20 in favor, 3 in opposition and 0 abstentions:

WHEREAS
the Student Bar Association is both a representative body entrusted with the responsibility to enact the will of its constituents and a group of student leaders with a duty to uphold the values of the greater Washington University School of Law Community;

WHEREAS
Washington University School of Law has enacted, supported, and believes in a Non-Discrimination Policy that expressly prohibits discrimination based on gender or sexual orientation;

WHEREAS
the United States Department of Defense has enacted, supported, and believes in a hiring policy that blatantly discriminates based on gender and sexual orientation;

WHEREAS
Washington University School of Law has therefore historically barred United States Military Recruiters from recruiting law students within its walls;

WHEREAS
the United States Department of Defense therefore has improperly issued an interim regulation under the

authority of the Solomon Amendment, forcing Washington University School of Law, as well as all other American Association of Law Schools accredited law schools, to suspend its Non-Discrimination Policy, allowing Military recruitment within its walls;

WHEREAS
the United States Department of Defense's insistence on the practice of discrimination at Washington University School of Law is invidious, and perpetuates both ignorance and injustice at a time when the Nation formally and generally has repudiated prejudice and bias as the bases of social policy;

WHEREAS
the entire Washington University School of Law Community is undeniably adversely affected, pained, and outraged at being hindered in the pursuit of education, forced to compromise its principles in the face of economic threat, and further forced to suffer discrimination based on gender and sexual orientation;

WHEREAS
the Faculty and Administration of Washington University School of Law believe that the students should express their concern that a wise Non-Discrimination Policy is so suspended, and therefore support the ameliorative actions prescribed by the American Association of Law Schools, and further propose ameliorative efforts based upon the suggestions of concerned students;

THEREFORE,
be it resolved by the Student Bar Association, that we do hereby clearly, undeniably, and unequivocally resist, oppose and are outraged by the suspension of the

Washington University School of Law Non-Discrimination Policy;

THEREFORE,
be it further resolved by the Student Bar Association, that we hereby clearly, undeniably, and unequivocally support and subscribe to the ameliorative efforts proposed by the Faculty and Administration of Washington University School of Law based upon the suggestions of concerned students;

THEREFORE,
be it further resolved by the Student Bar Association, that we do hereby clearly, undeniably, and unequivocally support and join with the Washington University School of Law Community in its pain, outrage, and struggle during the suspension of our Non-Discrimination Policy;

THEREFORE,
be it further resolved by the Student Bar Association, that we do hereby clearly, undeniably, and unequivocally support and believe in the Washington University School of Law Non-Discrimination Policy as it stands, expressly prohibiting discrimination based on gender or sexual orientation; and the method by which this Policy has historically been enforced, preventing United States Military recruitment within our walls.

EXCERPTS OF CHEMERINSKY DECLARATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

No. 03-Civ.__

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, INC. ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD. IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE; ET AL., DEFENDANTS

DECLARATION OF ERWIN CHEMERINSKY

I, Erwin Chemerinsky, declare pursuant to 28 U.S.C. § 1746, as follows:

1. I am currently the Sydney M. Irmas Professor of Public Interest Law Legal Ethics and Political Science at the University of California School of Law. ("USC Law" or "the Law School"). I have been on the USC Law faculty since 1983. If called as a witness. I could and would testify to the following based on personal knowledge or, if indicated, based on information and belief. This declaration, of course, reflects my personal views and does not communicate the views of the Law School or University.

USC's Pedagogical Mission And Principles of Equality

2. USC Law's core purpose, of course, is to teach students the law. However, this means more than a rote memorization of legal rules. USC Law School is not an extended bar review course. Instead, teaching

and learning the law means exploring the philosophical, economic and intellectual underpinnings of the law in its historical and current form. It means showing the law's profound influences on society, good and bad. It means showing future lawyers and judges how their actions, from the filing of a complaint to the arguing of a case, can profoundly change our society, its mores and values. Therefore, the Law School's mission requires students to analyze those legal principles, as expressed in the Constitution, the common law, statutes, regulations, and policies, that our society now holds dear. As well, it requires a close look at those laws and legal principles our society now finds anathema, such as state sponsored discrimination. Critical to this mission is true understanding of the viewpoints that formed past laws and the viewpoints that may be sponsored or trammeled by present and future laws.

3. Diversity in our Law School and toleration of viewpoints, beliefs, and backgrounds is essential to this mission. It is only by the free expression of ideals and beliefs from individuals with a variety of viewpoints and personal experiences that the Law School's goal of teaching the law can be achieved.

4. Current and incoming students need look no further than the Student Handbook to understand that this is how USC Law has conceived the law should be taught and that this is the manner in which the law is taught. The Student Handbook contains a statement entitled USC Law's "Principles of Community." That statement begins:

> The University of Southern California's Division of Student" Affairs bears a central responsibility for the provision to students of services and resources

which will assist in their total development - intellectual, social, cultural, physical, emotional and moral.

A true and correct copy of this statement is attached at Exhibit 1.

5. It then continues:

> USC is a multicultural community of people from diverse racial, ethnic, and class backgrounds, national origins, religious and political beliefs, physical abilities, and sexual orientations. Our activities, programs, classes, workshops, lectures, and every day interactions are enriched by our acceptance of one another, and we strive to learn from each other in an atmosphere of positive engagement and mutual respect.
>
> We want to make explicit our expectations regarding the behavior of each member of our community. As adults, we are responsible for our behavior and are fully accountable for our actions. We each must take responsibility for our awareness of racism, sexism, ageism, xenophobia, homophobia, and other forms of oppression.
>
> Bigotry will not go unchallenged within this community. No one has the right to denigrate another human being on the basis of race, sex, sexual orientation, national origin, etc. We will not tolerate verbal or written abuse, threats, harassment, intimidation, or violence against person or property.

See Exhibit 1.

* * * * *

7. Consistent with its now 103 year commitment to diversity, to its fostering of a pedagogical philosophy that demands that students and faculty understand and consider diverse views, and consistent with its implied and explicit stand against discrimination as antithetical to its mission, USC has long had a written non-discrimination policy (the "Non-discrimination Policy" or "Policy"), the current version of which states:

> USC is firmly committed to a policy against discrimination based upon ethnicity, natural origin, disability, race, religion, political beliefs, gender, sexual orientation, or age.

A true and correct copy of the Policy is attached at Exhibit 3. Far from signaling a new policy, USC Law's Policy is merely a formalized statement of what has always been an integral feature of USC Law's ethos, namely that USC Law cannot tolerate discrimination of any kind in whatever form and fulfill its educational mission. USC Law recruits and enrolls students based in part on its non-discrimination policies. As well, it insists that its students, employees and faculty abide by these policies. In short, integral to USC Law's philosophy, its message and its long tradition is that discrimination will not be tolerated or sanctioned by USC Law.

8. The Law School's pedagogical mission and its policies are not mere platitudes that are handed down for reluctant enforcement. I believe them to be essential to my role as a member of the faculty. I came to and have stayed at USC Law precisely because it fosters an open environment where the ideas of all have merit and where the students can be taught to be positive and productive members of the community in all its aspects.

* * * * *

Recruiting and Career Services

10. On information and belief, USC Law extends its Non-discrimination Policy to potential employers who recruit on campus. The Law School Career Services Office instructs those employers:

> The Law School is firmly committed to a policy against discrimination based on ethnicity, national origin, disability, race, religion, gender, sexual orientation or age.
>
> Consequently, the Career Services facilities of the Law School are available only to those employers whose practices are consistent with the nondiscrimination policy. Employers are required to sign a statement of compliance before participating in any on-campus interviewing program and when listing a position with the Career Services Office. The Law School takes compliance with the non-discrimination policy seriously and will fully investigate complaint of discrimination.

A true and correct copy of this statement is attached at Exhibit 5.

11. On information and belief: there are several reasons for USC Law's decision to apply the Policy in this manner. First, it was consistent with the Law School's own non-discrimination values and messages. Second, USC Law wished to convey its non-discrimination message to as wide an audience as possible. The Law School was not merely interested in conveying the message that it did not believe in discrimination; it also wished to convey the message that it would not tolerate discrimination and would not be seen to

tolerate it expressly or implicitly. Third, USC Law students are from a diverse background and the Law School wished to ensure that each and every student had the opportunity to be considered on their merits by each and every employer who used the Career Services Office. As Law School Dean Matthew L. Spitzer explained in an August 19, 2002 open letter to the use Law community:

> The reason behind applying our policy to employers is one of fairness to our students: we recruit and enroll students based in part on our non-discrimination policies; and we-wish to assure our students that they will receive equal treatment while enrolled at USC. Therefore, we consider it inappropriate to provide services to any employer whom we know has an affirmative policy of discriminating against certain of our students in violation of our non-discrimination policy.

A true and correct copy of dean Spitzer's letter is attached at Exhibit 6.

12. As the Dean went on to explain:

> Each year the military employers seeking to recruit on campus indicate that they cannot certify that they are in compliance with the Law School's policy because they are not able to certify that they are in compliance with our policies because they discriminate on the basis of age, disability or sexual orientation.

Exhibit 6.

On information and belief, on the basis of Dean Spitzer's August 19, 2002 letter, I understand the information in the following paragraphs to be true:

13. Following the adoption of the Solomon Amendment in 1994, which threatened to cut off funding for schools that did not allow the military to recruit on campus, USC Law continued to restrict access to military recruiting at the Law School because of the military's refusal to certify that it did not engage in discrimination. See Exhibit 6.

14. When Congress enacted another version of the Solomon Amendment ("Solomon II") in 1997 which broadened the types of federal funds put at risk to include some types of student aid, USC Law was one of only a small number of schools that continued to restrict access to the military. See Exhibit 6.

15. USC Law School did not want to endorse the military's position on "discrimination, but the-likelihood of losing this federal funding prompted the Law Schools to create an exception to its non- discrimination policy for military recruiters. The Law School allowed military recruiters to recruit Law School students; however, in order to continue its long tradition and stance against discrimination, the Law School asked that the military recruiters do their recruiting at the ROTC offices located on the campus of the University of Southern California ("USC"). The ROTC offices are conveniently located on the USC campus. In contrast, all other employer interviews take place across the street from the Law School campus. See Exhibit 6.

16. Thus, USC Law did the following for military recruiters: Military recruiters were provided the standard employer information and material, information and materials provided to each and every employer recruiting on the Law School's campus; military recruiters were referred to the ROTC offices so that they could schedule space for an interview (the recruiters

were familiar with this process and the ROTC offices); the Law School then posted a notice in the weekly career services newsletter, along with all other employer announcements, the date when the military recruiters would be at USC and the place they would be located; finally, the Law School made available to all students the materials provided by the military recruiters. See Exhibit 6.

17. This process worked well for the military, and military recruitment of USC Law School students increased. Between 1990 and 1993, no graduates were hired by the military. Between 1994 and 1996 three graduates were hired. Between 1997 and 2001, nine students were hired by the military. See Exhibit 6.

18. The military recognized the benefits of this policy although it did require USC Law to make an exception to its non-discrimination policies. More than once, military recruiters initially notified the Law School that its method of accommodating military recruiters was not in compliance with the Department of Defense regulations promulgated pursuant to Solomon II. However, until 2001, each year the military changed its position and approved the arrangements. See Exhibit 6.

19. The military has gone so far as to applaud the accommodation. For example, in 1998 the Department of the Army concluded that the accommodation was in compliance with federal regulations. Lieutenant Robin L. Hall, Chief Judge Advocate Recruiting Office for the Department of the Army, wrote on August 31, 1998," Thank you for providing our military recruiters a degree of access to students that is equal in quality and scope to that afforded other employers, consistent with the regulations. . . ." Exhibit 6.

20. However, in 2001, the military changed its position, without providing a reason for doing so. On December 17, 2001, United Air Force Colonel Daniel B. Fincher wrote to the President of USC, Steven B. Sample, asking for clarification of the Law School's policies for military recruiters. USC General Counsel, Todd Dickey, responded to this letter by providing Colonel Fincher the information concerning the policy as described above. See Exhibit 6.

21. On May 30, 2002, despite six years of the same policy and as many, if not more, recruiting trips by the various branches of the military, including the Air Force, for the first time Colonel Fincher informed Mr. Dickey that the Law School was not in compliance with federal law and regulations. Colonel Fincher stated "If the law school allows the military full access to the services of the Career Services Office, the students, and the law school, your institution will be in compliance with federal law." Colonel Fincher also wrote that the Law School had to modify its practices prior to July 1, 2002. If not, Colonel Fincher's letter stated that he would recommend to the Secretary of Defense that all federal funding to the University should be denied. Exhibit 6.

22. In response to the letter, the General Counsel of USC contacted the Department of Air Force and the General Counsel of the Air Force. USC explained that the Law School's practices complied with federal regulations and that they served the goals of the military. First they allowed students interested in military employment to pursue that interest as shown by the recruiting data. In this regard, USC also noted that its military recruiting policy benefited the military because it minimized student protests that might hinder the

military's ability to recruit students. Second, they allowed the Law School to maintain its commitment to non-discrimination. Exhibit 6.

23. In response, the Air Force General Counsel, Mary L. Walker, stated that the Law School's military recruitment practices were not in compliance with federal regulations and Solomon II. The military apparently was not convinced by the data showing that the policy exception was working to the benefit of military recruiters. By letter dated August 13, 2002, the Air Force informed USC that "While we understand JAG recruiters and USC students may face protests if they participate in your OCI program, it is important the United State Air Force be treated the same as any other employer. . . ." Exhibit 6.

24. To my knowledge, nowhere in the August 13, 2002, letter, or in any other correspondence with the Air Force, was there any reason given for the military's change of position in 2001. That is, the military has never explained why the Law School's recruitment policies were satisfactory from 1995 until 2001 but not thereafter. Moreover, no one, to my knowledge, explained or has explained how treating the Air Force "the same as any other employer" would further advance the military's interest in a way that the Law School's recruitment policy would not or had not.

25. In addition to corresponding with the General Counsel of the Air Force, USC's General Counsel also spoke to a Mr. Reed, an attorney in the Office of the General Counsel of the Department of Defense. In his August 19 letter Dean Spitzer described that conversation as follows:

Mr. Reed stated that the Department of Defense would not interfere with the Air Force's decision, and that the only way to ascertain the Secretary of Defense's position on the matter would be if we prohibited the Air Force from participating in [on campus interviewing] and the Air Force recommended to the Secretary that our federal funding be revoked for non compliance. . . . Mr. Reed confirmed that Department of Defense regulations do not provide an opportunity for a school to "cure" its, perceived compliance. While we may request that the Secretary advise us of his decision prior to any action being taken with regard to our federal funding, there is no requirement that he do so.

While sympathetic to our position, Mr. Reed stated that in today's military climate, the Department of Defense "has the resolve to use whatever legal avenues are made available" to it—including the Solomon Act. He said that the current mood in the Department of Defense is that it "doesn't want to play games" with the law schools, and expects the law schools to abide by all of the protections the Solomon Act has to offer. In his view, because Congress has consistently been strengthening the Solomon Act over the past several years, Congress would disapprove if the Department of Defense did not take full advantage of the Solomon Act's protections, and the Department likely will not risk offending Congress because it continually goes before Congress for funding and other assistance. In short, while Mr. Reed would not predict how the Secretary would rule on the Law School's practice of conducting military recruiting at our ROTC

facilities, his statements implied that now is not the time to challenge the Air Force on this issue.

Exhibit 6.

26. Following this correspondence with Mr. Reed and the Air Force's General Counsel, the Law School changed its military recruitment policy. Exhibit 6. On information and belief, the military now participates in all Career Services Office programs, including the on-campus fall interview program although it violates the Law School's Non-discrimination Policy.

27. On information and belief, the Law School believed it had no choice but to do this. The only choice USC and the Law School had was to comply fully with the military's dictates or lose millions of dollars in federal funding essential to USC's well being. Even were the Law School and USC ultimately vindicated, the fact that they would receive no federal funds while pursuing that result would cripple USC and the Law School, depriving students of an education. Neither USC nor the Law School could take this risk.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

* * * * *

EXCERPTS OF ESKRIDGE DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ____

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, DEFENDANTS

DECLARATION OF WILLIAM N. ESKRIDGE

I, William N. Eskridge, Jr., declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am a 1978 graduate of the Yale Law School (also referred to herein as "Yale Law" or the "Law School"). Since 1998, I have been a tenured Professor of Law at the Law School and have held a Chair as the John A. Garver Professor of Jurisprudence. During academic year 2001-02, I was the Deputy Dean at the Law School. If called as a witness, I could and would testify to the following based on personal knowledge, or if indicated, on information and belief.

The Yale Law School's Educational Mission

2. In 1974, while in graduate school at Harvard University, I applied to and was admitted to several leading American law schools. The reason I chose to attend the Yale Law School was its commitment to

academic values of critical inquiry. I wanted to learn legal reasoning and rules, but I also wanted to approach this body of professional discourse critically. I found Yale to be a good environment for this pedagogical goal.

3. The mission of the Yale Law School, then and now, has not merely been to prepare students for the practice of law, but to foster thoughtful research and discourse on law and justice. This mission has been central to the Law School since at least 1874, when then-President Woolsey declared: "Let the school, then, be regarded no longer as simply the place for training men to plead causes, to give advice to clients, to defend criminals; but let it be regarded as the place of instruction in all sound learning relating to the foundations of justice. . . ."

4. Throughout its history, the Law School's faculty, students, and deans have taken a broad view of the role of law and lawyers in society. Yale Law prides itself in seeking to train lawyers not just for private practice, but for public service and teaching. Yale University ("Yale" or "the University"), the academic institution of which Yale Law is a part, has vested it with the authority to do so as it sees fit with near-absolute autonomy.

5. Because I had grown up in a sex- and race-integrated environment, I considered a plurality of voices important to the critical project. I believed that a law school creates this environment in part through the students that it selects to participate in its academic community. I was fairly well-impressed by Yale Law's student diversity during my time there (1975-78). There was a better racial, gender, and class mixture of students at the Yale Law School than I had found at my undergraduate school or at my graduate school depart-

ment. Over the last 25 years, the Law School has become significantly more diverse. From my perspective as an alumnus, and from the Law School's perspective as an institution, this has been central to the educational mission of the school.

6. Admitting a diverse class plants the seeds for free dialogue, but the hospitable setting of openness and sensitivity blooms best when the Law School is able to communicate those foundational values of diversity and equality effectively, live by them faithfully, and enforce them consistently. Yale Law's normative baseline is a commitment to respect and equality, which depends on an attitude that everyone engaged in discourse is fully equal, and that they and their ideas will be judged on the basis of their character, merits and accomplishments, not on the basis of invidious comparisons. For example, in November 2002, an African-American student was accosted in the student lounge by a staff member, who reportedly asked him, "You don't look like you belong here." That student and many others in the community were justifiably concerned about this incident. Consistent with our general non-discrimination Policy, the Dean called a town-hall meeting, where he took responsibility and offered amends for the incident. The Faculty voted to establish a committee to study the experience of racial minorities at the Law School and to suggest ways to make that experience better.

* * * * *

8. In my experience as a student, however, there were limits to Yale's openness and, therefore, to Yale's commitment to cutting-edge legal discourse. Between 1975 and 1978, I do not remember a single sympathetic or even neutral reference to gay people from any pro-

fessor or student at the Yale Law School. Homosexuality was not openly discussed in any class I took—even though gay rights attorneys were challenging sodomy laws all over the country as violations of the privacy right, lesbian and gay soldiers were questioning their exclusion from the armed forces, and gay, lesbian, and bisexual teachers, publishers, and student groups were making new first amendment law almost every month. As many as 10% of my graduating class was lesbian, gay, or bisexual, but most of us were in the closet and many of us were afraid of identifying ourselves even to other gay people. The universal feeling among gay students I knew (or came to know later) was that you could not have a successful legal career if you were professionally open about your minority sexual orientation. So no one was.

9. Even a whiff of lavender would, we thought, disqualify you from jobs at the most prestigious law firms. There was some question whether one could become a member of the bar associations in some states if one were a "practicing homosexual." The *Yale Law Journal* seemed—to us—to penalize students for gender or sexual variation. One of the most brilliant students in my class was passed over for an officership of the *Yale Law Journal*, allegedly because he was considered to "flaunt" his homosexuality, and another capable student did not even submit his name for an officership, in my opinion partly because of rumors that he was gay.

10. As a closeted gay student, I assumed that being secretive about one's sexual orientation was part of the nature of things and that neither the law nor our professors offered us any hope for more dignified treatment. I was resigned to this reality, but several of my

student colleagues were not. Their activism proved to be a transforming event in the history of the Yale Law School and in my own life.

Yale Law's Adoption of a Non-Discrimination Policy in 1978

12. As of 1978, the Yale Law School had codified its credo of non-discrimination in a formal policy ("Policy") that refused to allow discriminatory employers to use our Placement Office. The 1977-1978 Bulletin (p. 113) said this:

> The Law School has long taken a vigorous stand against any discrimination on grounds of religion, race, sex, or national origin in the use of placement facilities by employers. A Placement Committee composed of faculty, students, and alumni has been formed to deal with specific complaints from students of such discrimination. * * *

(A true and correct copy of this page of the Bulletin is attached as Exhibit 1 to this Declaration.). This Policy was considered integral to the equality of opportunity and critical inquiry which we consider to be the hallmarks of the Law School. Anyone on campus who discriminates in ways that the Law School considers invidious strikes at the heart of Yale Law's values, threatens to shatter the setting of openness and sensitivity that the Law School strives so hard to cultivate, and disrupts the Law School's expression of its endorsement of the values of diversity and equality.

13. I was aware of this Policy when I was a student, and I was further aware that it did not include people like me in its protections—nor did I expect the Law School to do so. Bob Weiss, my colleague in the Class of 1978, did not share my acquiescence. He and several

other students put this inconsistency to the Law School Faculty: You are committed to equality, and you say you will not be complicit with any discrimination against your students—but the most open and pervasive discrimination is that faced by your lesbian, gay, and bisexual students. So what are you going to do about it? (We were informed that the law schools at NYU and USC had just adopted policies barring employers who discriminated against gay students.)

14. On information and belief: In meetings held in late April and the first week of May 1978, the Yale Law School Faculty deliberated a proposal by the Placement Policy Committee, that the Policy be amended to include sexual orientation discrimination.[1] A number of objections were posed. The chief ones were that the Faculty should not take positions on political issues "external to the school," and that sexual orientation discrimination was not as serious a matter as sex or race discrimination. Supporters of the proposal responded that if the Law School were going to operate a Placement Office, it must take responsibility for discrimination that occurred under its auspices. The Law School has an obligation to *all* its students, including its lesbian, gay, and bisexual students. This was an obligation of community.

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16. On information and belief: one professor reportedly summed up the dual obligations the Law School had to its lesbian, gay, and bisexual students: "[O]pposition to the proposal which rested on the absence of

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[1] I was not present at any of the Faculty meetings, but I have read the minutes of the meetings and have heard first-hand accounts from students and teachers who were present.

a record of refusals to hire missed the point. The point was the necessity for concealment of homosexuality, and consequences of such concealment. A decision on the merits was appropriate because the issue involved both our employment service and members of our community, whom we admitted without regard to sexual preference and who deserved our protection."

17. On information and belief: At the meeting of May 4, 1978, the proposal won a vote of 23 to 7, and further polling by the Dean confirmed that the proposal was adopted by the requisite majority. It was reflected in the 1978-1979 Bulletin (p. 109). The current version of the Policy is as follows:

> Yale Law School is committed to a policy against discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment), marital, parental or veteran status, sexual orientation, or the prejudice of clients.

(A true and correct copy of this page of the Bulletin is attached as Exhibit 2.)

18. The Faculty's 1978 amendment to the Policy was perceived by most of the lesbian, gay, and bisexual students as a signal that they were accepted as equal members, perhaps for the first time, by the Law School community. On information and belief, based on conversations my student Derek Dorn (Class of 2002) or I have had with dozens of gay and lesbian Law School alumni,[2] the 1978 Policy also initiated a process by

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[2] Derek Dorn wrote his Supervised Analytic Writing paper under my supervision, "Sexual Orientation and the Legal Aca-

which the Yale Law School not only became an openly accepting place for gay, lesbian, bisexual, and transgendered students and professors, but also became a center for fact-based and critical thinking about issues of sexuality, gender, and the law.

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20. In my informed opinion, the welcoming attitude of Yale Law to sexual and gender minorities has had a direct payoff in the intellectual life of the Law School and has had an influence beyond Yale's ivy walls. I was a Visiting Professor at Yale Law in Fall Term 1995. My main goal was to try out on the Yale students a first draft of the teaching materials Professor Nan Hunter and I had developed on Sexuality, Gender, and the Law for Foundation Press. The seminar I taught was filled with students (of various orientations) brimming with ideas and insights about these issues, and their brilliant discussions and comments on my casebook dramatically influenced us as Nan and I redrafted it in the next year. *Sexuality, Gender, and the Law*, published in 1997, is an important collaborative effort that would not have been possible without these law students—one of whom (Kenji Yoshino, Class of 1996) is now the co-author of the other leading sexuality and the law casebook, published by the West Publishing Company. Professor Yoshino and I both joined the Faculty in 1998, and we have emerged as leading authorities on the issues treated in our books and articles.

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demy: The Experience at Yale" (June 2002). Much of it was an account of the 1978 amendment to the Policy and its ramifications in the 1980s. Dorn's paper won the Scharps Prize for best paper by a third-year (graduating) student.

21. In my informed opinion, the Supreme Court's recent decision in *Lawrence v. Texas* illustrates the way in which the Yale Law School's commitment to factual, rational, and non-discriminatory discourse about sexual and gender minorities has enriched American public law. *Lawrence* overruled the Court's earlier decision in *Bowers v. Hardwick*, which had ruled that the claim that American constitutional traditions protected intimate relationships of gay people was, "at best, facetious." Scholarship by a range of thinkers, many of them post-1978 Yale Law graduates, demonstrated the factual and normative problems with the Court's opinion in *Hardwick*. Yale graduates were key players in that precedent's demise. The brief for the prevailing parties in *Lawrence* was masterminded by one Yale Law alumna (Ruth Harlow, Class of 1986, Lambda's Legal Director), and the oral argument for the petitioners was by another alumnus (Paul Smith, Class of 1979)—both beneficiaries of the 1978 Policy amendment. The opinion for the Court cited and drew heavily on the data, materials, and arguments presented by the historical brief I filed for the Cato Institute and by the international law brief Professors Harold Koh and Kenji Yoshino (both Yale Law professors) filed for Mary Robinson and various international human rights groups. The majority opinion also cited and drew extensively from my published historical critique of *Bowers*. Even Justice Scalia's dissenting opinion cited and learned much from my book *Gaylaw: Challenging the Apartheid of the Closet* (1999).

22. It is too much to say that the outpouring of Yale-based lesbian and gay advocacy and scholarship is the direct result of the 1978 Policy amendment. But I am sure that my own work criticizing *Bowers*, based upon

extensive historical research, would not have been possible without the support of the law school communities at Yale and Georgetown (where I taught from 1987-98 under the protection of a similar non-discrimination policy). I do not think it unfair to say that the nation's understanding of the historical as well as normative context of consensual sodomy laws has been deeply enriched as a result of the intellectual as well as community commitment to equality that has been the hallmark of the Yale Law School.

Application of Yale Law's Non-Discrimination Policy to Legal Employers

Recruiting At Yale

23. The Career Development Office at Yale Law (CDO) assists students and graduates in identifying career objectives and obtaining employment that meets those objectives. Its approach is to assist in self-assessment and in defining career goals, as well as in teaching students and graduates the career skills that will serve them well in the practice of law. CDO is staffed by counselors with expertise in both the public and private sectors, as well as in judicial clerkships and fellowships. Through CDO, students locate summer and full-time positions with law firms, public interest organizations, government agencies, law schools, legal services organizations, corporations, fellowship programs, judges, and others.

24. Every year, CDO sponsors a Fall Interview Program (or "FIP") for second- and third-year students and a Spring Interview Program (or "SIP") for first-years. In the fall, some 250 legal employers from all over the country and abroad register to interview students for summer and permanent positions. Another 30

employers participate in the spring program. The two formal programs are now held off-campus. Yale decided in 1982 that the presence of many employers on campus disrupted the educational environment. Students and employers who participate in the programs meet in rooms at a nearby Holiday Inn, a walk of about five to seven minutes from the Law School campus. In advance of the program, students sign up for interviews with employers of their choice. The CDO transmits the resumes of the students to each employer. Students may also sign up for any empty interview slots. Employers must take the initiative in reserving interview rooms, and make sleeping arrangements directly with the Holiday Inn. CDO does not make these arrangements.

25. Beyond these formal programs, employers have any number of vehicles by which to recruit Yale Law students—whether or not the Law School approves of the employers' hiring practices:[3]

- Employers who opt not to send a recruiter to New Haven can send targeted mailings to students.

- Employers can request a Yale Law School Facebook to determine which students it wishes to contact, then look up their email addresses on the Yale University website: www.yale.edu/yaleinfo.

- Legal employers can encourage their Yale Law School graduates to serve as mentors to student

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[3] The CDO website, <www.law.yale.edu/outside/html/career_development/cdo-empindex.htm>, lists various ways outside employers may contact Yale Law students.

organizations or to students seeking career advice by joining the Alumni Mentoring Network.

- Yale participates in the Equal Justice Works in Washington, DC, every October, and co-sponsors the Public Interest & Public Service Legal Career Symposium in New York City every February.

- Yale Law School participates in PSLawNet, a database of public interest organizations, government agencies, judges and private firms with public interest or significant pro-bono practices. PSLawNet helps students throughout the country find volunteer public interest positions.

In short, any employers interested in connecting with Yale Law students have any number of easy and effective vehicles at their disposal.

Yale Law's Non-Discrimination Recruiting Policy

26. Based upon the Policy as amended in 1978, Yale Law has adopted a firm, unshakable non-discrimination recruiting policy (the "Recruiting Policy"). An employer who discriminates may pursue any of the foregoing alternate recruiting vehicles, but the CDO will not affirmatively help them. Pursuant to Faculty policy, the CDO requires each employer using its services to sign a non-discrimination statement, which now reads:

Yale Law School Nondiscrimination Form

I, [Name of Representative], an authorized representative of [Name of Employer], affirm that said employer is aware of and complies with Yale Law School's nondiscrimination policy, as stated below:

> Yale Law School reaffirms its policy against discriminatory employment practices. The law school does not countenance any form of discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment), marital, parental or veteran status, sexual orientation, or the prejudice of clients.

(A true and correct copy of the form is attached as Exhibit 3.) That means that employers who do not sign the statement (or signify their agreement to its terms) may not participate in the fall or spring programs under the CDO's auspices and may not place job postings on the CDO website. The CDO will not help them arrange interviews.

27. Yale has applied the Recruiting Policy to discriminatory employers on more than one occasion. On information and belief: In the 1990s, the Christian Legal Society sought to participate in FIP. In light of the organization's expressed intent to use religious affiliation as well as sexual orientation as hiring criteria, Yale Law denied the request. The Christian Legal Society protested that its criteria were necessary for its mission, but the Law School insisted that it could not cooperate with even the most well-intended discrimination without compromising its Policy as amended in 1978. On the other hand, the Law School informed the Christian Legal Society that the names and contact information for Yale Law students were matters of public record, and the Society was perfectly free to contact the students without the participation of the Law School. Moreover, the Law School invited a representative of the Christian Legal Society to debate Associate Dean Stephen Yandle in the Law School Auditorium. The

Christian Legal Society accepted that offer, and I am reliably informed that the debate took place.

28. The Law School does not apply the Recruiting Policy lightly. On information and belief: After some students complained that the CIA might be discriminating on the basis of sexual orientation, the Law School investigated the claim, and declined to bar the CIA from the interview process. Yale Law applied the same attention and consideration to its decision, discussed in the following sections, to apply the Recruiting Policy to military recruiters because of the military's discrimination against gays.

Application of the 1978 Non-Discrimination Policy to Military Employers

29. Yale Law is not hostile to the military or military recruiting. To the contrary, the Law School has a long affiliation with the military. On information and belief: One of the earliest courses on military law was taught at Yale. Joe Bishop, a Yale Law student and then professor, wrote the leading casebook on military law. The Law School has trained numerous individuals who went on to work for the military, including former Secretary of the Army Clifford Alexander (Class of 1958), former Under-Secretary of Defense James Woolsey (Class of 1968), and former Under-Secretary of the Navy Jerry Hultin (Class of 1972). One former Yale Law student is now a deputy general counsel at the Department of Defense.

30. On information and belief: Once the Law School adopted the 1978 amendment to the Non-Discrimination Policy, the CDO was no longer able to cooperate with recruiters from the armed forces. Recall that CDO would not cooperate with any employer who could

not make the declaration of non-discrimination detailed in the form quoted above (Exhibit 3). The various branches of the armed forces could not make that declaration, and so the resources of CDO were not available to them. The military's policy of excluding those who admitted being gay, regardless of the content of the applicants' character or the singularity of their success, flew in the face of Yale Law's overarching mission of equality.

31. The Recruiting Policy did not, however, prohibit, or in effect prevent military recruiters from gaining entry to the Law School campus or access to Yale Law students. Recruiters have been welcome to meet with individual students or groups of students at the invitation of a student or student group; students or student groups can reserve Law School spaces for such meetings (if available). Like all employers who asked, the military received the Yale student facebook, with names and contact information of every student in the school. The military could contact any or all of these students. The Recruiting Policy did not prohibit students from contacting, interviewing with, working for or joining the military either during or after law school. Nor did the Recruiting Policy bar the military from recruiting Yale Law students where and when other employers did. Nothing stopped the military from booking a room at the Holiday Inn, posting a sign up sheet, publicizing its presence at the hotel, and interviewing students exactly when and where the other employers do.

32. The records of the Yale Law School probably do not contain all the interactions between the Law School and military recruiters in the wake of the 1978 amendment to the Policy, but I believe one exchange is repre-

sentative. In 1984 and again in 1986, military officers complained that the Law School did not give them access to its students for recruitment purposes. Both times, Associate Dean Jamienne Studley responded to their complaints. Her June 1986 letter says this:

> [C]onsistent with its commitment to freedom of speech and freedom of association, the Yale Law School does not bar military recruiting personnel from our premises or property or from contacting, interviewing or recruiting Yale Law School students. It is our policy, however, to extend the services of the Office of Career Planning and Placement only to employers that comply with the Law School's non-discrimination policy, a copy of which Dean Calabresi sent to you. Yale Law School welcomes the use of these placement services by any employer, either military or non-military, that agrees to abide by this non-discrimination policy, which applies equally to all employers.

(True and correct copies of the letters are attached as Exhibit 4.) On information and belief: There was at least one other similar exchange, occurring in the winter and spring of 1992. In response to a complaint by Brigadier General G.L. Miller of the Navy, Dean Calabresi reiterated that the Navy had full and complete access to Yale Law students—but not participation in the Law School's career services program.

33. On information and belief: The Yale Law School's Deans and other Officers implemented the Recruiting Policy, from the beginning, with an understanding that the Law School does not bar military recruiters from our campus or from having access to our students—but also with a strong understanding

that we cannot, consistent with our commitment to equality for gay people, offer our institutional imprimatur to such recruiting. These early exchanges illustrate how our Recruiting Policy has an important symbolic component. The military could continue to recruit Yale Law students, but the Law School would no longer endorse or subsidize the military's recruitment efforts by performing the matchmaking services.

34. The understanding reflected in the preceding paragraphs is reflected in the fact that a number of post-1978 graduates have served with distinction in the military. They include the Honorable James Baker (Class of 1990), Lieutenant Commander Frank Bowman (Class of 1998), Deputy General Counsel Paul Cobb (Class of 1990), Lieutenant Colonel William Lietzau (Class of 1989), NASA General Counsel Michael Schlabs (LLM Class of 1986), the Honorable Lisa Schenck (LLM Class of 1998), Michael Schmitt (LLM Class of 1991), Tyler Mulligan, Navy JAG (Class of 1999), and Michael Thomas, USAA (Class of 1995).

Yale Law School's Efforts to Comply with the Solomon Amendment

35. In 1994, Congress adopted its initial version of the Solomon Amendment (now codified at 10 U.S.C. § 983). In February 1996, Army Lieutenant Colonel Michael Child wrote Dean Kronman informing him of the new Department of Defense policy denying funds to institutions that deny or effectively prevent military recruiting personnel from having entry to campuses or access to students. Lieutenant Colonel Child asked Dean Kronman to explain Yale Law's policy in this regard. In a letter of April 2, 1996, Associate Dean Barbara Safriet explained that Yale's Recruiting Policy does not prevent access to either the campus or our

students to military recruiters. The services of the CDO, she continued, are not available to any employer not complying with Yale's non-discrimination policy—but even those employers have formal and functional access to the campus and the students. (True and correct copies of these letters are attached as Exhibit 5.)

36. On information and belief: After adoption of the Solomon Amendment, Yale Law believed it was in full compliance with 10 U.S.C. § 983, because it did not "prohibit[], or in effect prevent[]" the military "from gaining entry to campuses, or access to students on campuses." And even if the Law School's general policy of refusing to assist the military in arranging interviews were somehow considered a prohibition, Yale believed the Law School also fell within the regulatory safe harbor for schools that give the military the same level of access as every other employer. (See the regulatory attachment in Exhibit 5.)

37. Yale Law continued to stand by its non-discrimination Recruiting Policy, however. On information and belief: In 1999, and perhaps on other occasions as well, a military recruiter sought to use the services of CDO without properly signing the required Form. In August 1999, the Air Force recruiter signed the form but amended it in tiny handwriting to conform to the military's policy of no "unlawful" discrimination against lesbians, gay men, and bisexuals. The CDO rejected this submission but went out of its way to welcome the Air Force to contact students directly and to provide precise information on how to do so. Ms. Theresa Bryant, Yale's CDO Director, emphasized in her letter of October 6, 1999: "Consistent with its long standing commitment to freedom of speech and association, the

law school has never denied or prevented any recruiters from contacting our students or coming onto our campus." (True and correct copies of this letter and the exchange of letters and forms described above are attached as Exhibit 6.)

38. On information and belief: For several years the Department of Defense sent annual letters to Yale, asking whether the Law School was allowing military recruiters on its campus, and asking Yale to confirm that it was in compliance with the Solomon Amendment. Each year Yale University responded that Yale Law School does not allow *any* recruiters, including the military, to hold interviews on campus, and that Yale believed it was in compliance with the Solomon Amendment. Each time the military dropped the matter. (True and correct copies of letters from March 1998 are attached as Exhibit 7.) All of that changed in 2001, during my tenure as Deputy Dean of the Yale Law School.

39. In December 2001, Army Colonel Clyde Tate II wrote to Yale President Richard Levin expressing the Army's understanding that recruiters were being "inappropriately limited in their ability to recruit or have been refused student recruiting information at Yale University by a policy or practice of the Yale Law School," and gave the University 30 days to clarify its recruiting policy toward military recruiting. (A true and correct copy of this letter is attached as Exhibit 8.)

40. On January 14, 2002, President Levin responded with a letter to Colonel Tate, explaining that Yale University did not have a university-wide recruiting policy. The individual graduate and professional schools and Yale College, he said, each had their own policies, but none of them prohibited or effectively pre-

vented military recruitment on campus. With regard to the Law School, President Levin noted that recruiters were welcome to meet students on campus at the invitation of any student or student group; the Law School gave military recruiters (like all other recruiters) access to student directory information, and, although the CDO's interview programs were open only to those employers that comply with the nondiscrimination policy, all interviews were all held off-campus. President Levin emphasized, however, that military recruiters did not need to use CDO's services to gain entry to campus or access to students on campus. (A true and correct copy of this letter is attached as Exhibit 9.)

41. In a letter of May 29, 2002, Colonel Tate responded that the Army believed Yale was "not complying with federal law and regulations with respect to access" to the law school for military recruiting. On information and belief, the assumption of Colonel Tate's letter—and subsequent communications with Yale—was that the Department of Defense was demanding the same recruiting access for the armed forces that any other employer was provided. This requirement is nowhere to be found in the text of the Solomon Amendment, 10 U.S.C. § 983. Unless Yale modified its policies by July 31, 2002, Colonel Tate informed President Levin that the Army would consider recommending that the Department of Defense cut off Yale's federal funds. (A true and correct copy of this letter is attached as Exhibit 10.)

42. Yale Law received an extension to respond to the Army's demand, and the Yale Law Faculty met in early September 2002 to discuss the issue. A large majority of the Faculty were present, and we voted

unanimously to approve a resolution expressing our support for the Policy and our opposition to allowing any discriminating employer—including the military—to participate in the CDO recruiting process. My best recollection is that all of us who spoke at the meeting strongly endorsed the non-discrimination Recruiting Policy integral to our identity as a community of students and teachers and to our academic mission. It was, for me as well as for others who spoke, a deep violation of our academic freedom to sacrifice the integrity of the Policy to satisfy what we thought were demands that went well beyond the language of the Solomon Amendment. (No matter how many times you read the Solomon Amendment, only through stretching its language on the rack can you generate the construction placed on it by the Department of Defense, namely, that the Law School must give its recruiters the same access that non-discriminating recruiters receive.)

43. Most of us who spoke at the Faculty meeting also revealed frustration with the armed forces for what we considered bullying tactics. The prospect of imposing costs of more than $300 million on Yale University was one that we could not bear. As I listened to my colleagues' anguish over what the Defense Department was threatening, I recalled the novel *Sophie's Choice* by William Styron. Surely, the choice presented to us was not nearly so brutal or tragic as that Sophie had to make (deciding which of her children would live), but requiring us to choose between our integrity (our identity as a leading voice for non-discrimination) and the research of our colleagues in the University left me with some of the same feelings that the fictional character had—remorse and guilt (How could I face my stu-

dents, especially my lesbian and gay students?). And in our case, I also felt sadness that a democracy committed to academic freedom was putting this choice to us without either statutory or constitutional justification. With all my colleagues, I voted to give our Dean, Anthony Kronman, the authority to suspend application of the Recruiting Policy to the military if it put the University's funding in jeopardy. The resolution emphasized that the Law School's ultimate goal should be to find a means by which Yale Law could preserve its nondiscrimination policy.

44. On information and belief: On September 23, 2002, Dean Kronman and others from the University and Law School traveled to Washington, D.C. to meet with representatives of the Army's Judge Advocate General's Office. The Yale representatives offered further accommodations, including Law School-hosted informational meetings for military recruiters to talk with students. The following day, Dorothy Robinson, Yale University's General Counsel, sent Lieutenant Colonel Chris DeToro of JAG a letter formally offering these accommodations, in return for allowing the Law School to respect the integrity of its Recruiting Policy.

45. President Levin reiterated this proposal in a letter of September 26 to Army Colonel Michele Miller. President Levin also stated the two reasons for the University's belief that the Law School's Policy complied with the Solomon Amendment. First, Yale did not interpret the Solomon Amendment to require equal treatment, and equal treatment does not even become an issue under the regulations unless a school prohibits or prevents entry to campus. Second, that condition does not apply to Yale; in any event, CDO does not schedule or facilitate interviews at the law school

building for any employer. President Levin noted that Yale had not received any confirmation that the Army had modified its earlier conclusion that Yale was not in compliance with the Solomon Amendment, despite the previous discussions and submissions amplifying Yale's policies. Because so much University money was in jeopardy, President Levin informed the Army that the Law School would temporarily suspend the application of its non-discrimination requirements to military recruiters to enable them to participate in the Fall Interview Program sponsored by CDO. Again, however, he asked whether the Department of Defense believed Yale's proposal for accommodating military recruiting of law students would satisfy the Solomon Amendment. (A true and correct copy of this letter is attached as Exhibit 11.)

46. On information and belief: Two branches of the military participated in the 2002 fall program. One student interviewed with the Army through the on-line bidding system arranged by CDO, and one student interviewed with the military without going through CDO's on-line system. One student was hired for the summer program.

47. On October 17, 2002, Colonel Miller of the Army contacted the University again. Rather than respond to President Levin's inquiry, however, she informed Yale that the Army interpreted President Levin's letter to mean the Law School would not allow military recruiters to participate in CDO program in the future. Colonel Miller asked that President Levin respond by October 25, 2002, if the Army's interpretation was incorrect. (A true and correct copy of this letter is attached as Exhibit 12.)

48. In a letter of October 24, President Levin responded to Colonel Miller, reiterating the University's view that Yale's policies and practices serve the needs of military recruiters and complied with the Solomon Amendment, and noting that the University was still waiting for the Army's conclusion. President Levin informed the Army that it was incorrect in interpreting his letter to mean that military recruiters would not be allowed to participate in future interview programs. Rather, the University's intention was "to address the question of participation in the Spring 2003 Interview Program of the law school at a future time, after we have received your response." (A true and correct copy of this letter is attached as Exhibit 13.)

49. The military provided no direct response to President Levin's inquiries. Instead, Colonel Miller wrote yet another letter, dated January 6, 2003, asking the same question—whether Yale would offer the military "the same opportunity to participate in the Spring 2003 Interview Program, *as well as subsequent interview programs*, that it offers to other employers." (I have supplied the emphasis here.) The letter gave Yale 11 days to respond, and warned that the Army "will consider any response other than an affirmative one to be a negative response." (A true and correct copy of this letter is attached as Exhibit 14.)

50. In a letter of January 17, 2003, President Levin wrote to Colonel Miller that Yale was committed to working with the Army to ensure that it was in full compliance with the Solomon Amendment, and that no one from the Army or the Department of Defense had yet to respond to Yale's detailed proposal to accommodate military recruiting. In light of the ongoing threat to the University's funding, however, the Law School

would continue temporarily to suspend application of its Recruiting Policy to military recruiters to enable them to participate in the spring program. President Levin stated, however, that no determination had been made regarding subsequent off-campus interview programs, pending an explanation "within a reasonable period of time" from the Army as to whether Yale's program complies with the Department of Defense's interpretation of the Solomon Amendment.

51. In his letter of January 17, President Levin made it even easier for the Army to clarify, by asking three pointed questions. First, he asked if it was the Army's position that, in order to comply with the Solomon Amendment and its accompanying regulations, Yale must afford military recruiters "the same access to [Yale's] students as that afforded to other [non discriminating] employers." Second, if that was indeed the Department of Defense's interpretation, President Levin asked if it applied to off-campus interviewing. (The letter, reiterating Yale's position, stated that an affirmative answer to either of these questions would represent a "fundamental misreading of the statute.") Third, he inquired whether the Department of Defense had concluded that Yale's proposed arrangement violated the Solomon Amendment. (A true and correct copy of this letter is attached as Exhibit 15.)

52. The University received no answer other than a letter from Colonel Miller stating that the Army interpreted President Levin's letter as a refusal to state "whether it will apply the [non discrimination] policy to the military at future Fall and Spring interview programs." Yale had, in the Army's view, "declined to suspend permanently the application of its policy to the military and will not offer the military the same oppor-

tunities to participate in the interview program that it offers to other employers." The Army concluded that Yale was not in compliance with federal law and regulations, and vowed to forward a recommendation to the Office of the Secretary of Defense to "consider[] . . . funding denial." (A true and correct copy of this letter is attached as Exhibit 16.)

53. On information and belief: Taking advantage of Yale's decision to suspend its policy, three branches of the military sent recruiters to the CDO's spring interview program. No student signed up to interview. The recruiters knew in advance that they had no interviews but nonetheless attended the program and sat in their interview rooms for the entire day. As if to underscore Yale's argument that the military was not—and never had been—barred from the campus, one of the military recruiters at one point left his interview room, walked on campus, and entered a Law School building in full military dress. He approached a table where students from a gay and lesbian student group (OUTLAWS) were handing out literature about the military's policy, as well as rainbow pins and other tokens of solidarity. The recruiter picked up some of the literature and chatted with students at the table engaging them in a spirited discussion about the military's policy.

54. On information and belief: On March 7, 2003, President Levin called Dr. David S. C. Chu, the Under-Secretary of Defense for Personnel Readiness. During that call, the Under-Secretary reportedly committed that Department of Defense would send Yale a letter setting out its position on compliance with the Solomon Amendment, including exactly what Yale must do to satisfy the law, and that the University would have a chance to respond in writing. Levin followed up with a

letter to the Under-Secretary in which he recounted the various communications between Yale and the Army with respect to military recruiting, and emphasized that the University has repeatedly requested clarification of the Department of Defense's interpretation of the Solomon Amendment without success. He also confirmed the commitments that Dr. Chu made in their telephone conversation. President Levin requested an in-person meeting with Department of Defense representatives to answer questions and discuss alternatives to Yale's proposal, if the Department of Defense believed that the proposal was inconsistent with the Solomon Amendment. He also asked that Department of Defense give Yale at least 72 hours notice before determining officially that Yale was in violation. (A true and correct copy of this letter is attached as Exhibit 17.)

55. On May 29, 2003, Acting Deputy Under-Secretary of Defense William Carr sent President Levin a letter stating that Yale's recruitment policy with respect to military recruiters was in violation of federal law, and a recommendation would be forwarded to the Principal Deputy Under-Secretary of Defense for Personnel Readiness to declare Yale ineligible for Department of Defense funding, and, by extension, for any other funding covered by the Solomon Amendment. Department of Defense gave Yale one month—until June 29, 2003—to promulgate "a change in policy sufficient to overcome the deficiencies outlined" in the letter. (A true and correct copy of this letter is attached as Exhibit 18.)

56. In June 2003, Dean Kronman of the Law School convened a meeting of Faculty to inform us of the developments since September 2002. I was somewhat

surprised to learn that the Defense Department persisted in reading an "equal access" into the Solomon Amendment and in claiming that the Law School was not giving military recruiters effective access to our students and our campus—notwithstanding the many accommodations made by the Law School to assure such access. Like other Faculty who spoke at that meeting, I lamented the fact that the Law School had already sacrificed its non-discrimination Policy to satisfy a stance taken by the armed forces that seemed —after months of letters and requests for clarification—to be without statutory basis. Universities, I reflected, are situses of critical thought and sometimes dissent. We dissent from objectionable policies by how we structure our processes (including our placement process) as well as by how we express ourselves in writing or in public speaking. What a sad day for Yale, and what a sad day for academe, that the Defense Department is allowed to dictate to our Law School the expressive features of our governance.

57. Unable to convince the Department of Defense that Yale was in compliance with the Solomon Amendment, the Law School and the University have left in place the September 2002 suspension of the Law School's non-discrimination Recruiting Policy as applied to military recruiters. Without further action by the Department of Defense, the University, or a judge, military recruiters will be able to participate in CDO's fall interviewing program, which commences this month.

I declare under penalty of perjury that the foregoing is true and correct.

EXCERPT OF EXHIBIT 2 TO ESKRIDGE DECLARATION

BULLETIN OF YALE UNIVERSITY
Series 74
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10 August 1978

[Picture Omitted]

Yale Law School
1978-1979

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Placement Service

The Placement Service schedules interviews at the Law School with law firms, governmental agencies, law schools, legal service organizations, corporations, public interest law firms, and others. From these interviews, mostly conducted in the fall term, many third-year students obtain post-graduation employment and many second-year students and some first-year students obtain summer jobs. In addition, files are kept in the Placement Office on job opportunities around the country. Alumni placement committees have been organized in many states and in the District of Columbia to report job opportunities and to assist graduates wishing to locate in the area.

The Law School has long taken a vigorous stand against any discrimination on grounds of religion, race, sex, or national origin in the use of its placement facilities by employers. A Placement Committee composed of faculty, students, and alumni has been formed to deal with specific complaints from students of such discrimination. This committee also has jurisdiction over discrimination based upon age and sexual orientation. A description of the makeup and functions of the Committee is contained in the Law School Placement Regulations, which may be obtained from the Placement Office.

* * * * *

EXCERPTS OF EXHIBIT 5 TO ESKRIDGE DECLARATION

[Seals Omitted]

DEPARTMENT OF THE ARMY
JUDGE ADVOCATE RECRUITING AND PLACEMENT SERVICE
8930 FRANKLIN ROAD
FORT BELVOIR, VIRGINIA 22060-5223
(800) 336-3315 (703) 806-6230
FAX: (703) 806-5382 DSN: 656-5382

February 28, 1996

Dean Anthony Kronman
Yale Law School
P.O. Box 208215
New Haven, CT 06520-8330

Dear Dean Kronman:

I understand that military recruiting personnel are unable to recruit on the campus of Yale Law School by official policy of the Law School. Section 503 of title 10 United States Code, note, prohibits grant and contract awards of DoD funds to any institution of higher education that has a policy of denying, or that effectively prevents, military recruiting personnel entry to campuses or access to students on campuses. * * *.

Under DoD Directive 1322.13, this letter provides you an opportunity to clarify you institution's policy on military recruiting on the campus of Yale Law School. In that regard, I request the official written policy of the institution about visits of civilian employers (public or private) and military recruiting personnel to the campus for recruiting law students.

* * * Should it be determined that Yale Law School is not qualified to receive such funds, all current pro-

grams requiring payment to Yale Law School shall be stopped, and it shall be ineligible to receive future payments of DoD funds through grants, contracts, and other applicable agreements.

I regret that this action may have to be taken. Successful recruiting requires that DoD have reasonable access to students of colleges and universities, and at the same time to have effective relationships with the officials and student bodies of those institutions. I hope it will be possible for military recruiters to schedule recruiting visits at Yale Law School in the near future. * * *.

Sincerely,

/s/ MICHAEL S. CHILD
MICHAEL S. CHILD
Lieutenant Colonel, US Army
Chief, Judge Advocate Recruiting
and Placement Service

YALE LAW SCHOOL
P.O. Box 208215
New Heaven, Connecticut 06520-2815

April 2, 1996

[Seal Omitted]

BARBARA J. SAFRIET
ASSOCIATE DEAN

(203) 432-1685
(203) 432-7362 FAX

Michael S. Child
Lieutenant Colonel , U.S. Army
Chief, Judge Advocate Recruiting and
Placement Service
8930 Franklin Road
Fort Belvoir, VA 22060-5223

Dear Colonel Child:

* * * * *

Your understanding that "military recruiting personnel are unable to recruit on the campus of Yale Law School by official policy of Yale Law School" incorrect. Consistent with its longstanding commitment to freedom of speech and association, the law school has never denied or prevented *any* recruiters from contacting our students or coming onto our campus. If a military recruiter is invited by a law student or law student organization, the recruiter is welcome to meet with the student(s) on campus. In addition, all employers (both military and non-military) are afforded the same opportunities to inform students about their recruitment activities and to obtain available student directory information.

The Law school is also committed to equality of opportunity for all of our students. It is therefore our

policy to extend the particular services of the Career Development Office only to those employers, military or non-military, who comply with our non-discrimination policy, a copy of which is enclosed. Let me emphasized however, that utilization of the services of that office is not necessary in order for military recruiting personnel to center the campus and to have access to students and student directory information. The Yale Law School has no policy that denies or effectively prevents these activities.

* * * * *

Sincerely,
[Signature Illegible]

EXCERPT OF EXHIBIT 6 TO ESKRIDGE DECLARATION

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS ELECTRONIC SYSTEM (AFMC)
HANSCOM AIR FORCE BASE MASSACHUSETTS

[Seal Omitted]

[Received: 20 Sep. 1999]

ESC/JA
35 Hamilton Street
Hanscom AFB, Ma 01731-2010

Yale School of Law
Attn: Lucy A. Mignone
Director, Recruitment Programs
P.O. Box 208330
New Haven, Ct 06250-8330

Dear Mrs. Mignone,

I recently received your correspondence regarding our proposed recruitment visit to your school. I understand your concerns regarding discrimination on the part of the prospective employers. However, the United Stated Air Force does not unlawfully discriminate in its hiring practices and my correction to your form reflected that policy. I am writing to you to restate that our hiring policies are lawful and to request that a representative from the United States Air Force be allowed to visit and meet with interested Yale student about opportunities in the United States Air Force Judge Advocate General's Department. If you are willing to accommodate this request, please send me a

written response to this letter detailing the reasons for such a denial so that I may forward it to the appropriate recruiting office for further action.

* * * * *

Sincerely,

/s/ WAYNE P. GORDON
WAYNE P. GORDON, Capt. USAF
Office of the Staff Judge Advocate

[Seal Omitted]

Yale Law School

CAREER DEVELOPMENT OFFICE

October 6, 1999

Wayne P. Gordon, Captain, USAF
Office of the Staff Judge Advocate
Hanscom AFB
35 Hamilton Street
Bedford, MA 01731-2010

Dear Captain Gordon:

* * * Consistent with its long standing commitment to freedom of speech and association, the law school has never denied or prevented any recruiters from contacting our students or coming onto our campus. If a military recruiter is invited by a law student or law student organization, the recruiter is welcome to meet with the student(s) on campus. In addition, all employers (both military and non-military) are afforded the same opportunities to obtain available student directory information and to inform students about their recruitment activities. * * *.

The law school is also committed to equality of opportunity for all of our students. It is therefore our policy to extend the particular services of the Career Development Office of facilitating our off campus fall interview program, only to those employers, military or non-military, who comply with our non-discrimination policy, a copy of which you have received previously. Let me emphasize, however, that utilization of the services of our office is not necessary in order for military recruit-

ing personnel to enter the campus and to have access to students and student directory information.

* * * * *

Sincerely,

/s/ THERESA J. BRYANT
THERESA J. BRYANT
Executive Director and Director of Public Interest Counseling

P.O. BOX 208330, NEW HAVEN, CONNECTICUT 06520-8330 -
TELEPHONE 203 432-2676 – FACSIMILE 203 432-8423
EMAIL CDO.LAW@YALE.EDU – HTTP://WWW.LAW.YALE. EDU/CDO
COURIERS ADDRESS 127 WALL STREET, NEW HAVEN,
CONNECTICUT 06511

Yale Law School is committed to a policy against discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment) marital, parental, or veteran status, sexual orientation, or the prejudice of clients. All employers using the school's placement services are required to abide by this policy.

EXCERPT OF EXHIBIT 7 TO ESKRIDGE DECLARATION

DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
901 NORTH STUART STREET
ARLINGTON, VA 22203-1837
March 16, 1998

[Seal Omitted]
REPLY TO
ATTENTION OF
JUDGE ADVOCATE RECRUITING
and Placement Service

Dean Anthony KRONMAN
Yale Law School
P.O. Box 208330
New Haven, Ct 06520-8330

Dear Dean Kronman:

I understand that military recruiting representatives are unable to recruit on the campus of your law school by a policy or practice of the university or college. * * *.

This letter provides you an opportunity to clarify your institution's policy regarding military recruiting on the campus of the university and its college of law. In that regard, I request, within the next 30 days, a written statement of policies with respect to a military recruiter's access to campuses of the university and its college of law, to students on those campuses, and to student directory information. Your response should specifically highlight any differences between access for military recruiters and access for recruiting representatives of other potential employers.

Based on this information, Department of Defense officials will make a determination as to your institution's eligibility to receive funds by grant or contract. That decision may affect eligibility for funding from appropriations of the Departments of Defense, Transportation, Labor, Health and Human Services, Education, and related agencies. Should it be determined that the school is in violation of the aforementioned statutes, such funding would be stopped and the school would be ineligible to receive such funds in the future.

I regret that this action may have to be taken. Successful recruiting requires that Department of Defense recruiters have reasonable access to students on the campuses of colleges and universities, and at the same time have effective relationships with the officials and student bodies of those institutions. I hope it will be possible to develop an on-campus recruiting arrangement allowing reasonable access to your law students. I am available to answer any questions.

Sincerely,

/s/ DIANA MOORE
DIANA MOORE
Lieutenant Colonel, U.S. Army
Chief, Judge Advocate
Recruiting and Placement
Service

Copy Furnished:

Mr. Richard Levine
President, Yale University
Woodbridge Hall
43 Hillhouse Avenue
New Haven, CT 06520

[Seal Omitted]
Yale Law School

BARBARA I. SAFRIET
Associate Dean

March 31, 1998

Diana Moore
Lieutenant Colonel, U.S. Army
Chief, Judge Advocate Recruiting and
Placement Service
901 North Stuart Street
Arlington, VA 22203-1837

Dear Colonel Moore:

As the Associate Dean responsible for career services, I am pleased to respond to the concerns raised in your recent letter to Dean Anthony Kronman regarding military recruitment of Yale Law School students.

Your understanding "that military recruiting representatives are unable to recruit on the campus of your [Yale Law] school by a policy or practice of the university or college" is incorrect. Yale University does not have "a policy or practice of denying military recruiting representatives entry to campuses, access to students on campuses, or access to directory information on students."

Consistent with its long standing commitment to freedom of speech and associations, the law school has never denied or prevented *any* recruiters from contacting our students or coming onto our campus. If a military recruiter is invited by a law student or law student organization, the recruiter is welcome to meet with the student(s) on campus. In addition, all em-

ployers (both military and non-military) are afforded the same opportunities to inform students about their recruitment activities and to obtain available student directory information.

The law school is also committed to equality of opportunity for all of our students. It is therefore our policy to extend the affirmative assistance of the Career Development Office only to those employees, military or non-military, who comply with our non-discrimination policy, a copy of which is enclosed. Let me emphasize, however, that utilization of the services of that office is not necessary in order for military recruiting personnel to enter the campus and to have access to students and student directory information. The Yale Law School has no policy that denies or effectively prevents these activities.

Finally, I should note that approximately 98-99% of employers' recruitment activities do not take place on the campus. Despite the traditional misnomer, our Fall and Spring "On-Campus Interview" programs are all held at a hotel in New Haven. When I explained this to Lieutenant Colonel Michael S. Child (former Chief, Judge Advocate Recruiting & Placement Service) during our conversations in April 1996, he acknowledged that there had been a misperception concerning this issue.

I trust that this information will clarify our recruitment policy. Please let me know if your need any additional information.

Sincerely,

[Signature Illegible]

EXCERPTS OF EXHIBIT 8 TO ESKRIDGE DECLARATION

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1777 NORTH KENT STREET
ROSSLYN, VIRGINIA 22209-2194

Seal REPLY TO ATTENTION OF: December 17, 2001

Personnel, Plans, and Training Office

Richard Charles Levin
President, Yale University
P.O. Box 208279
New Haven, Connecticut 06520

Dear Mr. Levin:

I understand that military recruiting personnel have been inappropriately limited in their ability to recruit or have been refused student recruiting information * * * at Yale University by a policy or practice of the Yale Law School.

This letter provides you an opportunity to clarify your institution's policy regarding military recruiting on the campus of Yale University as well as Yale Law School. In that regard, I request, within the next 30 days, a written policy statement of the institution with respect to access to campus and students, and to student recruiting information, by military recruiting personnel. Your response should highlight any difference between access for military recruiters and access for recruiting by other potential employers. Specifically, 32 CFR 216.4(c)(3) requires that schools denying cam-

pus access, while identifying an alternative site, present evidence that the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers.

Based on this information, Department of Defense officials will make a determination as to your institution's eligibility to receive funds by grant or contract. That decision may affect eligibility for funding from appropriations of the Departments of Defense, Transportation, Labor, Health and Human Services, Education, and related agencies. Should it be determined that Yale University as an institution of higher education (or any subelement of the institution) is in violation of the aforementioned statutes and regulations, such funding would be stopped, and the institution of higher education (including any subelements of the institution) would be ineligible to receive such funds in the future.

I regret that this action may have to be taken. Successful recruiting requires that Department of Defense recruiters have reasonable access to students the on campus uses of colleges and universities, and at the same time, have effective relationships with the officials and student bodies of those institutions.

* * * * *

Sincerely,

/s/ CLYDE J. TATE II
CLYDE J. TATE II
Colonel, U.S. Army
Chief, Personnel, Plans, and
Training Office

EXCERPT OF EXHIBIT 9 TO ESKRIDGE DECLARATION

January 14, 2002

Clyde J. Tate II
Colonel, U.S. Army
Office of the Judge Advocate General
1777 North Kent Street
Rosslyn, Virginia 22209

Dear Colonel Tate:

* * * * *

Yale University does not have a university-wide policy with respect to recruiting on campus. Each of the graduate and professional schools and Yale College set their own policies with regard to career services. However, none of the schools prohibit or effectively prevent military recruiting on campus. Military recruiting personnel from the Air Force came on campus at the School of Epidemiology and Public Health last year. Army personnel also requested and gained access to the School of Nursing for recruiting purposes last year. At other times in the past, the Army, Navy and Marines have all requested and gained access to campus in order to recruit undergraduate students.

Your understanding that "military recruiting personnel have been inappropriately limited in their ability to recruit or have been refused recruiting information at Yale University by a police or practice of Yale Law School" is incorrect. Consistent with its long-standing

commitment to freedom of speech and association, the law school has never prohibited or prevented any recruiters from obtaining entry to campus or access to students on campus. If a military recruiter's invited by a law student or law student organization, the recruiter is welcome to meet with the student(s) on campus. In addition, all employers (both military and non-military) are afforded access to directory information on students.

It is the policy of the law school to hold all interview programs sponsored by its Career Development Office off-campus. Those programs are open only to those employers, military or non-military, who comply with its non-discrimination policy. Let me emphasize, however, that utilization of the services of that office is not necessary in order for military recruiting personnel to gain entry to campus or to have access to students on campus, as required by 10 U.S.C. § 983. The Yale Law School has no policy that denies or effectively prevents these activities.

* * * * *

Sincerely,

Richard C. Levin

EXCERPT OF EXHIBIT 10 TO ESKRIDGE DECLARATION

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1777 NORTH KENT STREET
ROSSLYN, VIRGINIA 22209-2194

Seal REPLY TO ATTENTION OF: May 29, 2002

Personnel, Plans, and Training Office

Richard Charles Levin
President, Yale University
P.O. Box 208279
New Haven, Connecticut 06520

Dear Mr. Levin:

This replies to your letter dated January 14, 2002, which responded to our earlier request that you clarify your institution's policy regarding military recruiting on your law school campus. Based on your letter and reports from our field screening officers, we believe that your institution is not complying with federal law and regulations with respect to access to your law school for military recruiting. In particular, the following information indicates that your institution is not in compliance with federal requirements:

a. The Law School has an institutionalized policy that limits military recruiting.

b. The military services are not provided access to interview programs sponsored by the Law School's Career Development Office (CDO). The CDO's off-

campus program is the primary means through which employers interview prospective applicants.

c. Military recruiters are not permitted to recruit on campus unless invited on campus by a law student or law student organization.

* * * * *

* * * Unless we receive new information from you by July 1, 2002, showing that policies and practices of your institution have been modified to conform with federal requirements, or that the above information about your school is incorrect, we will consider forwarding this matter to the Office of the Secretary of Defense with a recommendation of funding denial.

I regret that this action may have to be taken; however, as provided in federal law it is imperative that Department of Defense recruiters have reasonable access to your law school campus. * * *

* * * * *

Sincerely,

/s/ CLYDE J. TATE II
CLYDE J. TATE II
Colonel, U.S. Army
Chief, Personnel, Plans,
and Training Office

EXCERPT OF EXHIBIT 11 TO ESKRIDGE DECLARATION

Yale University

Office of the President

105 Wall Street, PO Box 208229
New Haven CT 06520-8229

September 26, 2002

Colonel Mickey Miller, U.S. Army
Chief, Personnel, Plans & Training Office
Office of the Judge Advocate General
1777 North Kent Street
Rosslyn, Virginia 22209

Dear Colonel Miller:

I write in response to Colonel Tate's letter dated May 29, 2002, regarding the Yale Law School. Yale University and the Yale Law School both recognize and value the many men and women who devote their lives to the military service of this country. We are proud of the many Yale graduates who have served with commitment and distinction, and we have sought to reflect those value in the approach we have taken to military recruitment of Yale Law students.

As I have previously written to Colonel Tate, we believe that the Yale Law School is currently in full compliance with the Solomon Amendment. * * *

* * * * *

Military recruiters are welcome to visit the Yale Law School. We have made it clear both in those communications and at the meeting which Yale's Vice President and General Counsel, Dorothy Robinson,

Dean Anthony Kronman and Associate Dean Barbara Safriet had with you on September 23, 2002, that we will make a Yale Law School classroom available for representatives of any of the services to use for an informational presentation to students, and afterwards for further discussions of any nature with students. Yale Law School students and any visiting employers—including military recruiters—are free to meet in any available location within the Yale Law School building for interviews or other purposes, and a student may reserve a room in the building in advance for such a meeting. Additionally, to accommodate the needs of the military for facilitated interviews, we have offered to provide a contact person at Yale who will schedule interviews in a reserved room in the Undergraduate Career Services Office on the University's campus, if any of the military services wish. * * *

* * * * *

Colonel Tate's principal complaint about the Yale Law School's practices instead focuses on the Law School's requirement that employers seeking to utilize the services of the Law school's Career Development Office sign a "non-discrimination" certification before being able to participate in its interview program which is held off campus twice a year at a nearby hotel. In effect, the complaint is not that the Army has been denied access—or even that the Army has not been offered assistance in meeting with students or setting up interviews—but that it has not been given the identical set of services provided to other employers. The statute, however, does not require equal treatment; and equal treatment does not even potentially become an issue under the religious unless a school prohibits or prevents entry to campus, 32 C.F.R. §

216.4(c). That condition does not apply to Yale. I also would point out that the Career Development Office does not schedule or facilitate interviews in the Yale Law School building for any employer.

The University intends to pursue a further agency or judicial determination of whether the Law School's long-standing practices and policies, as amplified in our recent communications, satisfy the requirements of the Solomon Amendments, as we believe they clearly do.

In the meantime, as you know, we have not received from you any confirmation that you have modified Colonel Tate's conclusion stated in his May 29, 2002 letter that Yale is not in compliance with the Solomon Amendment, despite our discussions and submission amplifying our policies. This leave us in a position of uncertainty regarding your judgment in this matter. Therefore, in order that we may pursue a determination of our contention that the Law School is in compliance with the Salomon Amendment without jeopardizing the University's federal funding, the Law School will temporarily suspend the application of its non-discrimination certification requirement to military recruiters to enable them to participate in the 2002 Fall Interview Program organized by the Career Development Office of the Law School. If you wish to participate in that program, your representative should contact Christine Severson at the Law School's Career Development Office at (203) 432-1676 for further information and assistance.

Sincerely,

/s/ RICHARD C. LEVIN
RICHARD C. LEVIN

EXCERPT OF EXHIBIT 12 TO ESKRIDGE DECLARATION

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1777 NORTH KENT STREET
ROSSLYN, VIRGINIA 22209-2194

Seal REPLY TO ATTENTION OF: October 17, 2002

Personnel, Plans, and Training Office
By Fax ((203) 432-7105) and U.S. Mail
Richard C. Levin
President, Yale University
P.O. Box 208279
New Haven, Connecticut 06520

Dear Mr. Levin:

This responds to your letter dated September 26, 2002, outlining proposed changes to Yale University's policy regarding military recruiting. We are grateful that military recruiters were allowed to participate in this fall's interview program organized by the Law School's Career Development Office. We interpret your letter, however, as stating that Yale University will not allow military recruiters to participate in this program in the future and that the Career Development Office will not facilitate such participation. Please let us know by October 25, 2002, if our understanding is correct.

* * * * *

/s/ MICHELE M. MILLER
MICHELE M. MILLER
Colonel, U.S. Army
Chief, Personnel, Plans, and
Training Office

EXHIBIT 13 TO ESKRIDGE DECLARATION

Oct. 24, 2002

Colonel Michele M. Miller, U.S. Army
Chief, Personnel, Plans & Training Office
Office of the Judge Advocate General
1777 North Kent Street
Rosslyn, Virginia 22209

Dear Colonel Miller:

I write in response to your letter dated October 17, 2002. As our representatives have told you, we would like to work with the Army and other military services to provide access to students at the Law School in a manner that serves the needs of military recruiters and complies with the Solomon Amendment. * * * We are still waiting for the Army's conclusion regarding this matter and its explanation of the basis of that conclusion. As you know, in the interim, earlier this month, both the Army and the Air Force were included in the Fall Interview Program sponsored by the Career Development Office of the Law School.

You are not correct that we have stated we will not allow military recruiters to participate in future interview programs of the Law School's Office of Career Development. We intend to address the question of participation in the Spring 2003 Interview Program of the Law School at a future time, after we have received your response.

Sincerely yours,

Richard C. Levin

EXCERPT OF EXHIBIT 14 TO ESKRIDGE DECLARATION

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1777 NORTH KENT STREET
ROSSLYN, VIRGINIA 22209

Seal REPLY TO ATTENTION OF: January 6, 2003

Personnel, Plans, and Training Office

By Fax ((203) 432-7105) and U.S. Mail
Richard C. Levin
President, Yale University
P.O. Box 208279
New Haven, Connecticut 06520

Dear Mr. Levin:

This responds to your letter dated October 24, 2002, stating that Yale will address participation in the Spring 2003 Interview Program after you have received a response from us regarding the proposed changes to your military recruitment policy as outlined in your letters dated September 24 and 26, 2002. As part of evaluating your proposed changes, we need to know whether Yale will offer the military the same opportunity to participate in the Spring 2003 Interview Program, as well as subsequent interview programs, that it offers to other employers. We will consider any response other than an affirmative one to be a negative response. Accordingly, please let me know by January 17, 2003, if you intend to allow military recruiters to

participate in the Spring 2003 Interview Program and subsequent interview programs.

* * * * *

Sincerely,

/s/ MICHELE M. MILLER
MICHELE M. MILLER
Colonel, U.S. Army
Chief, Personnel, Plans, and
Training Office

EXCERPT OF EXHIBIT 15 TO ESKRIDGE DECLARATION

YALE UNIVERSITY

OFFICE OF THE PRESIDENT
305 WALL STREET,
P.O. BOX 208229
NEW HAVEN,
CT 06520-8229

January 17, 2003

Colonel Michele Miller, U.S. Army
Chief, Personnel, Plans & Training Office
Office of the Judge Advocate General
1777 North Kent Street
Rosslyn, Virginia 22209

Dear Colonel Miller:

* * * * *

As I have previously written, Yale believes that its proposal plainly satisfies the requirements of the Solomon Amendment. Nevertheless, so that we may obtain a determination of our compliance without jeopardizing the University's federal funding, the Law School will continue temporarily to suspend application of its non-discrimination certification requirement to military recruiters to enable them to participate in the 2003 Spring Interview Program. We have not made a determination with regard to subsequent off-campus interview programs because, as noted in my earlier letters, we continue to await an explanation from the Department of the Army as to whether Yale's program complies with the Department of Defense's interpretation of the Solomon Amendment. We are willing to continue this suspension until we obtain that

determination, provided that it is forthcoming within a reasonable period of time.

Because we believe that the Law School proposal fully complies with the Solomon Amendment, we cannot correct any asserted deficiencies in it without the Army clarifying in what respects, if any, it believes the proposal is legally inadequate. In order to understand the Department's position regarding our obligations under the Solomon Amendment, we thus request that you answer the following questions:

First, is it your legal position, as your most recent letter can be read to state, that in order to comply with the Solomon Amendment and its accompanying regulations a covered school must afford Department of Defense recruiters "the same access to [Yale's] students as that afforded to other employers"? If that is your interpretation, do you contend that it applies to off-campus interviewing? In our view, an affirmative answer to either of these questions represents a fundamental misreading of the statute. As we read the statute, all that is required is that a covered school allow military recruiters access to students on campus, which the Law School does.

Second, is it the concluded view of the Department of the Army and the Department of Defense that Yale's proposed arrangement, as previously explained in letters dated September 24, 2002, and September 26, 2002, violates the Solomon Amendment and its accompanying regulations. For ease of reference, I repeat here the central features of the Yale Law School arrangement we have offered:

1. Military recruiters are welcome to visit the Yale Law School campus.

2. Upon request, the Law School will provide full use of a classroom for representatives of any of the military services to use for an information presentation to students, and afterwards for further discussions of any nature with students.

3. Yale Law School students and any visiting employers–including military recruiters–are free to meet in any available location within the Law School building for interviews or other purposes and a student may reserve a room in the building in advance for such a meeting.

4. If a representative of any of the military services would like University assistance in facilitating interviews with law students, upon request the University will provide a representative who will schedule interviews in a reserved room in the Undergraduate Career Services Office on the University's campus.

5. The military services may request and receive student contact information, which can be used to provide students with instructions for submitting resumes either to a representatives of the military or to Yale's contact person for facilitating interviews.

* * * * *

Sincerely yours,

Richard C. Levin

RCLmd

EXCERPTS OF EXHIBIT 16 TO ESKRIDGE DECLARATION

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1777 NORTH KENT STREET
ROSSLYN, VIRGINIA 22209-2194

Seal REPLY TO ATTENTION OF: March 3, 2003

Personnel, Plans, and Training Office

By Fax ((203) 432-7105) and U.S. Mail
Richard C. Levin
President, Yale University
P.O. Box 208279
New Haven, Connecticut 06520

Dear Mr. Levin:

This replies to your letter dated January 17, 2003, which responded to our January 6, 2003 request that you clarify your institution's policy regarding military recruiting involving your law school.

In our January 6 letter, we asked you state whether Yale will offer the military the same opportunities to participate in the school's interview program that it offers to other employers, and we noted that we would interpret any response other than an affirmative response as a negative response. You did not respond affirmatively to our question concerning future access to interview programs.

To summarize, we understand that (i) Yale's response confirms that the law school has a policy that an employer must sign a non-discrimination certification to participate in the Fall and Spring interview programs,

and (ii) although this policy was suspended with respect to military recruiters for the Fall 2002 interview program and will be suspended again for the Spring 2003 program, Yale has refused to state whether it will apply the policy to the military at future Fall or Spring interview programs. That is, Yale has declined to suspend permanently the application of its policy to the military and will not offer the military the same opportunities to participate in the interview program that it offers to other employees. Based upon your letters and reports from our field screening officers, and after considering your proposed recruiting policy, we believe that your institution is not in compliance with federal law and regulations regarding access to your law school for military recruiting.

* * * * *

Accordingly, in accordance with 32 CFR, Part 216, I am forwarding this matter to the Office of the Secretary of Defense for consideration of funding denial.

* * * * *

/s/ MICHELE M. MILLER
MICHELE M. MILLER
Colonel, U.S. Army
Chief, Personnel, Plans, and
Training Office

EXCERPT OF EXHIBIT 17 TO ESKRIDGE DECLARATION

YALE UNIVERSITY

OFFICE OF THE PRESIDENT

FOR WALL STREET,
P.O. BOX 208229
NEW HAVEN CT 06520-8229

March 10, 2003

Dr. David S.C. Chu
Under Secretary of Defense
For Personnel and Readiness
100 Defense Pentagon
Washington, D.C. 20301-1000

Dear Dr. Chu:

* * * * *

Yale has long history of working cooperatively with the military. We have repeatedly made clear that military recruiters are welcome to visit the Yale campus and that both the Law School and the rest of the University would take steps to accommodate military recruiters. Yale has never taken the position that military recruiters should be denied "entry to campuses" or "access to students on campuses[] . . . for purposes of military recruiting." 10 U.S.C. § 983(b). During a meeting held in September 2002 with Colonel Miller, Yale's Vice President and General Counsel and the Dean of the Law School, described the Law School's approach indicated their willingness to be responsive to the Army's concerns in arranging recruiting visits by

the military, consistent with the Law School's policy on non-discrimination.

In its correspondence with the Army, Yale has repeatedly requested clarification of the Department of Defense's interpretation of the Solomon Amendment, and for the legal authority that supports that interpretation. The Army has not responded to that request.

At the same time, while those requests have been pending, including most recently as described in my letter dated January 27, 2003, Yale has suspended application of the Law School's non-discrimination certification requirement for military recruiters during the School's 2002-03 Interview Programs. In fact, on February 6, 2003, recruiters from the Army, Navy and Air Force all participated in that Program alongside other employers. Nonetheless, the Army has made a determination of current non-compliance based on Yale's failure to avow for the future that the Law School will dispense with its non-discrimination certification requirement. We believe that determination was premature and not properly founded.

Now that the matter has been referred to the Department of Defense pursuant to 32 C.F.R. § 216, you have indicated that, prior to any determination of ineligibility, the Department will send us a letter setting out its position on compliance with the Solomon Amendment, including exactly what Yale must do to be compliant. You also confirmed that we will be afforded an opportunity to make a written submission. We appreciate that confirmation.

Given the severe consequences of any final determination of noncompliance with the Solomon Amendment, I respectfully make the following requests. First,

I would again request a face-to-face meeting with Department representatives, in order to answer questions and to discuss alternatives to Yale's proposal, if the Department believes that it is inconsistent with the Solomon Amendment. Second, if the Department reaches a final conclusion that Yale is not in compliance with the Solomon Amendment, I request that Yale be notified at least 72 hours prior to any determination of ineligibility under 32 C.F.R. § 216.5(a)(1), so that the University may decide its course of action.

Thank you for your consideration of these requests.

Sincerely yours,

/s/ RICHARD C. LEVIN
RICHARD C. LEVIN

RCL:md

cc: Colonel Michele M. Miller

EXCERPTS OF EXHIBIT 18 TO ESKIDGE DECLARATION

OFFICE OF THE
UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

May 29, 2003

[Seal]
PERSONNEL AND READINGS
By Fax [(203) 432-7105] and U.S. MAIL

Richard C. Levin
President, Yale University
P.O. Box 208279
New Haven, Connecticut 06520

Dear President Levin:

* * * * *

As the Department of the Army has advised, Yale University, acting through Yale Law School ("Yale"), has a policy that employers must sign a certification to use the services of the Yale Law School Career Development Office (CDO), including participation in the spring and fall interview programs. This certification requirement is inconsistent with federal law because it constitutes a policy or practice . . . that either prohibits, or in effect prevents . . . [the military] from gaining . . . access to students (who are 17 years of age or older) on campuses for purposes of military recruiting." 10 U.S.C. § 983(b)(1); *see also* 43 C.F.R. § 216.4(a). The certification that Yale requires will prevent the military from participating in the

interview programs for employers organized by the CDO.

Yale has indicated that it is willing to provide an alternate mechanism for military recruiters to attempt to contact students at Yale, including permitting recruiters to use a room in the Yale Law School building. As explained below, I have determined that for two reasons Yale's proposed policy violates federal law. First, the Department of Defense (DoD) has interpreted section 983 to require universities to provide military recruiters access to students equal in quality and scope to that provided to other recruiters. Yale's policy clearly fails to do this. Second, even if the statute did not require equal treatment, it squarely prohibits any policy that "in effect prevents . . . access to students." 10 U.S.C. § 983(b)(1). Under the particular circumstances here, we have concluded that exclusion from university-sponsored interview programs denies military securities effective access to students.

1. *Yale's Policy Fails to Provide Access that Is At Least Equal in Quality and Scope to that Provided to Other Employers.*

Yale's exclusion of the military from the centralized interview process organized by the CDO and instead permitting an alternative means for military recruiters to contact Yale Law School students fails to meet the requirements of the law for two reasons. First, DoD has interpreted section 983 to require that universities provide military recruiters access to students that is at least equal in quality and scope to the access provided other potential employers. By its terms, the statute announces the clear objective of prohibiting any policy or practices that "in effect prevents . . . access to

students." *See* 10 U.S.C. § 983(b)(1). In interpreting this requirement, DoD has concluded that effective access to students requires that there not be a substantial disparity in the treatment of military recruiters as compared to other potential employers. This understanding also promotes the clear objective of the law, which is to ensure that the military is not disadvantaged in relationship to other employers in recruiting from this Nation's universities. This interpretation is reflected in the sample letter or inquiry found in DoD's regulations that assessing compliance with 10 U.S.C. § 983 requires consideration of "any difference between access for military recruiters and access for recruiting by other potential employers." 32 C.F.R. Part 216 Appendix A; *see also* Letter to President Levin, Yale University, from COL Tate, Department of the Army (Dec. 17, 2001) (using same language).

This interpretation is also reflected in the regulations DoD has promulgated concerning circumstances in which the Secretary of Defense may determine that the prohibition of the statute do not apply. *See* 32 C.F.R. § 216.4(c). Many of these circumstances are based on a showing that the school's policy is applied similarly to other employers. *See id.* at § 216.4(c)(3), .(5), (6)(i), (6)(ii). In particular, the consequence of loss of funding will not apply where "the Secretary of Defense determines that the covered school . . . [w]hen not providing requested access to campus or to students on campus . . . presents evidence that the degree of access by military recruiters is *at least equal in quality and scope* to that afforded to other employers." *Id.*, § 216.4(c)(3) (emphasis added). This means that, even if the physical and temporal means of access is not

identical in all respects, the *degree* of access allowed military recruiters must be the same or greater than that afforded to other employers. This reflects the underlying principle that under DoD's construction of the statute, the prohibition of the law is designed to ensure military recruiters access to students that is equally effective as that provided to other potential employers.

This construction also best harmonizes section 983 with Congress' objectives regarding recruiting. As the Third Circuit has explained, "Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance." *United States* v. *City of Philadelphia*, 798 F.2d 81, 86 (3d Cir. 1986). Accordingly, 10 U.S.C. § 983 should, and will, be construed to require equal access for military recruiters—the construction that better permits the military to fulfill congressional interest.

Yale's proposed alternate arrangement therefore does not satisfy federal law because it does not satisfy the requirement that the degree of access to students be "at least equal in quality and scope to that afforded to other employees." *See* 32 C.F.R. § 216.4(c)(3). By prohibiting the military from using the services of the CDO, Yale's approach would impose substantial burdens and restrictions on military recruiters to schedule interviews with students through e-mail or other means, rather than through the standard processes provided by the CDO to other employers. The Yale approach would further hamper military recruiters by forcing them into a process that is fundamentally different from the one-stop-shopping that Yale establishes to allow students easy, streamlined access to a host of

other employers. This is clearly inconsistent with both the letter and spirit of the law.

Moreover, by singling out military recruiters, Yale sends the message that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations that Yale permits to participate in its CDO programs. This unequal treatment is clearly contrary to that required by law and regulation.

II. *Yale's Policy In Effect Prevents Access to Students*

* * * * *

Military personnel who have recently recruited at Yale Law School have reported that all significant interview scheduling and job information flowing through the Law School is maintained at the CDO. Possible alternative means of access (e.g., soliciting invitations from student groups, collecting names from the student directory) have proven inefficient at best and futile at worst. In sum, access through the standard processes of the CDO is a critical step in the recruiting process.

* * * * *

* * * Any other program limited to military recruiters will necessarily be second-rate.

As a result, Yale has created a system in which both students and prospective employers are conditioned to think there is one, central, organized system for distributing information about employers and matching interested students with appropriate employers. Shutting the United States Armed Forces out of that centralized process and relegating them instead to an

ad hoc mechanism of attempting to reach students *outside* the established procedures constitutions a policy that "in effect prevents access . . . to students."

* * * * *

IV. *Conclusion*

* * * * *

Although Yale has on two occasions during this current academic year waived its policy with respect to participation in the interviewing programs, Yale has refused to state whether it will apply the policy to the military for future interviewing seasons. That is, Yale has declined to suspend permanently the application of its policy to the military and will not offer the military the same opportunities to participate in the interview program that it offers to other employers. The policy thus remains an obstacle to military recruiters and their ability to plan for, schedule, and gain access to Yale Law School students for the purpose of military recruiting. By not providing the military's requested access and in effect preventing the military from gaining access to students, Yale's policy is in violation of federal law.

Therefore, it is my duty under law to recommend to the Principal Deputy Under Secretary of Defense for Personnel and Readiness that Yale University be determined ineligible for Department of Defense funding. * * *

Sincerely,

/s/ WILLIAM J. CARR
WILLIAM J. CARR
Acting Deputy Under Secretary
(Military Personnel Policy)

EXCERPT OF GERKEN DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ____

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICA LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, DEFENDANTS

DECLARATION OF HEATHER GERKEN

I, Heather Gerken, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am an Assistant Professor of law at Harvard Law School ("Harvard Law School" or "the Law School"). I file this declaration in a personal capacity, and not as a representative of Harvard Law School or its faculty. If called as a witness, I could and would testify to the following based on personal knowledge, or if indicated, on information and belief.

2. In addition to being the oldest continually operating law school in the country, Harvard Law School is also one of the nation's largest. The Law School's size, I believe, is one of its greatest strengths. As excerpts from promotional materials on the Harvard Law School website note, it allows for a deep and rich curriculum, with more than 250 elective courses and seminars offered each year. It supports a wide array of

research programs and student organizations; indeed, the website lists more than 90 of the latter. It has generated an exhaustive network of graduates; according to the Office of Admissions more than 65,000 students have studied at the Law School. Perhaps most importantly in my view, the Harvard Law School community includes a diverse student body, faculty and administration, through which the Law School, "is able to contribute solutions to the world's most complex legal and social challenges." A true and correct copy of the website materials are attached at Exhibit 1.

3. Harvard Law School is a place where, as Dean Elena Kagan explains in her welcome message on the Law School website, "rigorous and exciting legal training is intimately connected to the School's commitment to pathbreaking scholarship." Within these teaching and research activities, Dean Kagan explains further that:

> [e]ngagement with the world is a key feature and object. Harvard Law School is a place for people who love ideas because ideas make a difference, who want to think about the law's interaction with public policy and business, who care about how things work and how to improve them, who wish to avail themselves of the diverse opportunities that the legal profession offers to serve the public. . . . At Harvard Law School, and for all these people connected with it, the study of law is not an arid intellectual exercise. The study of law matters, and this is what gives Harvard Law School its sense of purpose and mission.

A true and correct copy of the Dean's message is attached Exhibit 2.

4. I think that respect for differences within the Harvard Law School community is critical to this mission. While the great diversity of views and backgrounds among our students and faculty make Harvard Law special, it is the extent of the Law School's commitment to protect and nurture this diversity that, in my view, makes it unique among institutions of higher education.

5. To give one example, I believe that the diversity in outlook, views, and experiences within our student body leads to a rich teaching environment in which all members of the community learn from one another. I have found that my classroom has been greatly enriched by the presence of a wide range of students who respect the differences and disagreements among them.

6. Harvard Law School has long maintained a recruiting policy (the "Policy") providing that:

> No employer may discriminate in any form based upon race, color, creed, national or ethnic origin, age, gender, sexual orientation, marital or parental status, disability, source of income, military status or status as a Vietnam era or disabled veteran. This rule applies not only to offers of employment, but also to salary scales, working conditions, type of work available, and promotion policies. It includes statements expressing discriminatory intentions or referring to race, color, creed, national or ethnic origin, age, gender, sexual orientation, marital or parental status, disability, source of income, military status or status as a Vietnam era or disabled veteran, which a student can reasonably perceive to be derogatory or offensive. These classifications are illustrative, not exhaustive.

A true and correct copy of the Policy is attached at Exhibit 3. The Policy and the other policies and guidelines concerning recruiting at Harvard Law are enforced by the Committee on Placement. Sanctions may be imposed for failing to comply. See Exhibit 3.

7. Harvard Law School requires that any employer who wishes to recruit on campus and utilize the services of the Office of Career Services abide by the Policy, and must sign a statement to that effect. See Exhibit 3.

8. The Office of Career Services page on the Law School's website notes that each year the office receives a number of complaints from students about offensive or discriminatory behavior on the part of interviewers, and also notes that there are formal procedures in place for students to complain about such behavior. See Exhibit 3.

The following, unless otherwise indicated, is on information and belief:

9. As explained in an August 23, 2002 memorandum to the Harvard Law School Community (the "Memo") from then-Dean Robert C. Clark ("Dean Clark"), a true and correct copy of which is attached at Exhibit 4, because military recruiters did not sign such a statement, they were not permitted to utilize the services of the Office of Career Services.

10. Dean Clark also stated that the Law School's application of the Policy did not prevent the military from recruiting effectively at the Harvard Law. Any official organization at the Law School may invite any person or organization onto campus. Prior to 2002, the Harvard Law School Veterans Association ("HLSVA"), a recognized student organization, invited military

recruiters to campus and facilitated their efforts at Harvard Law School. See Exhibit 4.

11. Under this system an average of one to three Harvard Law students each year joined one of the branches of the JAG Corps.

12. While Harvard's policy did not prevent the JAG Corps from recruiting Harvard students, I believe that it was important to some members of the law school community, as reflected in Dean Clark's statement in the Memo that "for many of us, a policy nondiscrimination on the basis of sexual orientation reflects a fundamental moral value." Exhibit 4.

13. In the Memo, Dean Clark announced that, in the 2002-2003 academic year, for the first time since the Law School included sexual orientation in its nondiscrimination policy, the U.S. military would be allowed access to the facilities and services of the Law School's Office of Career Services. See Exhibit 4.

14. Dean Clark explained that, back in 1998, the Air Force asked the Law School for information to determine whether it was in compliance with the Solomon Amendment. Dean Clark responded to the inquiry by explaining the Law School's non-discrimination policy for the Office of Career Services and the practice of having the military recruit through HLSVA. Based on this information, the Air Force determined that the Law School was in compliance with the Solomon Amendment. In December 2001, the Air Force again contacted the Law School regarding its policies toward military recruiters. As Harvard Law School's practices had not changed since the military's last inquiry, the Law School's initial response mirrored that which was sent in 1998. See Exhibit 4.

15. However, on May 29, 2001, the Air Force notified Dean Clark that it no longer viewed the Harvard Law School policy as being in compliance with the law. The Air Force's letter said that unless the Law School showed by July 1, 2002 that its "policies and practices had been modified to conform with federal requirements," the Air Force would "forward this matter to the Office of the Secretary of Defense with a recommendation of funding denial." Exhibit 4.

16. The Dean explained in the Memo that the Law School does not receive significant federal funding. The University, however, annually receives approximately $328 million from the federal government, which comprises approximately 16% of its operating budget. Under the terms of the Air Force's letter, it appeared that the Law School's refusal to permit military recruiters access to the services of the Office of Career Services would make the entire University ineligible for appropriations from the Departments of Defense, Transportation, Health and Human Services, Education and their related agencies. See Exhibit 4

17. Dean Clark wrote that because Harvard Law School's recruiting practices had implications beyond the Law School, he discussed the issue with Harvard University's general counsel extensively over the summer, and consulted with Harvard President Lawrence Summers. He said he also met with the Law School Placement Committee and took counsel from other faculty members and senior administrators of the Law School. At Dean Clark's request, the Placement Committee contacted the leadership of the Harvard Law School gay and lesbian student group, LAMBDA, to inform them of the situation and solicit their input regarding the Law School's response. See Exhibit 4.

18. According to the Dean, the Air Force granted Harvard Law School's request for more time to study the issue with a one-month extension, and on July 29, 2002, Dean Clark informed the Air Force of the Law School's decision to permit military recruiters to use the Office of Career Services that year and in future years. See Exhibit 4.

The Dean stated in the Memo that he was not anti-military:

> As a citizen, I am convinced that military service is both honorable and essential to the well-being of our country. I am deeply grateful for the sacrifices made by military personnel and the security and other benefits they provide to all of us. As Dean of Harvard Law School, I am also very proud of each and every graduate who has gone into military service, and I hope the number increases. Precisely because of this respect for military service, I believe that one way or another, all students should have access to these exceptional opportunities to serve their country.

Exhibit 4.

The Dean nevertheless sought to distance himself and the Law School from the military's discriminatory policies:

> Our hospitality does not imply that we endorse all of the military's personnel policies. The Law School condemns the military's discriminatory practices and remains committed to the principle of equal opportunity for all persons, without discrimination on the basis of sexual orientation. We are dedicated

> not only to the rule of law, but also to the advancement of just society.

Exhibit 4.

21. Dean Clark took the position that the decision to accommodate military recruiters was necessary because of the extraordinary impact a continued prohibition of recruiting through the Office of Career Services would have had on the University. At issue were not only the funds, but the fruits of those funds—students' educations, faculty's careers, significant medical and scientific research, and perhaps even cures to life-threatening diseases. See Exhibit 4.

22. The Dean remarked in his Memorandum that "some members of the community (especially our gay and lesbian students)" will endure "pain . . . because of the change in practice." He promised to work with LAMBDA, with other student groups, and with the faculty and administration "to discuss constructive measures that the Law School can take in support of its nondiscrimination policy." Exhibit 4.

23. The Dean closed his memo by expressing the hope that things would change:

> A society that discriminates on the basis of sexual orientation—or that tolerates discrimination by its members—is not a just society. I look forward to the day when the armed forces, like other employers who recruit at the Law School, adhere to the most basic fundamental principles of equal opportunity and nondiscrimination.

Exhibit 4.

24. On October 7, 2002, the date on or around the time military recruiters came to campus, I was among a

group of students and faculty who protested the military's presence at a rally on the steps of Langdell Hall, the main campus building.

25. Professor Janet Halley spoke at the rally. Her prepared remarks show her cynicism about the promises in Dean Clark's memo:

> Here's what I think has happened here at HLS and Harvard this summer and fall. The Bush Administration told Harvard that it was going to enforce a statute that allows it to cut off massive federal funds to the University unless the Law School waived enforcement of its sexual-orientation antidiscrimination policy, which till then had operated to keep JAG out of the official HLS recruitment program. University President Summers wanted the Law School to cave. . . . And so the Law School capitulated for him. As is happening all over America, our Dean is letting JAG on campus, in deference to a University President who is left politely off stage, while engaging in a compensatory celebration of gay identity and gay dignity. He's getting into bed with gay identity to commiserate about how terrible it all is. This rally, plus a few additional goodies thrown to LAMBDA, are ways in which gay identity makes this capitulation palatable, smooth, acceptable. This is a high price to pay.

A true and correct copy of Professor Halley's planned remarks are attached at Exhibit 5.

26. Professor Alan Dershowitz also spoke. He urged the Law School to challenge Solomon in court. He was quoted in an article covering the rally as saying:

> We are simply being told that if we continue to do the right thing . . . then other people will suffer as a consequence. That's just wrong. And it's so wrong that I think we ought to fight it in the courts. I think we ought to litigate this issue. I don't see the downside of litigating, of seeking at least a declaratory judgment in the courts. . . . Would it be worse to lose than not fight this fight? I don't think so. Better to fight the fight even there's a substantial risk of losing it because we will win it in the court of public opinion.

A true and correct copy of the article is attached at Exhibit 6.

27. Harvard Law student Adam Teicholz, then-President of LAMBDA and the rally organizer, heard Professor Dershowitz's statements as faculty support for litigation. He was quoted in the same article as saying, "It's a place full of lawyers . . . . But I think nobody really wanted to bring [talk of taking legal action against the government] out into the open until they were sure it would have strong faculty backing and I think Professor Dershowitz gave that today." Exhibit 6.

28. Some students challenged President Summers on the University's response to the military at a town hall forum in the Spring of 2003 convened to discuss the search for a new Law School dean. The Harvard Law School student newspaper, *The Record*, reported the comments of one student who expressed his disappointment that the former dean failed to challenge the military. He told President Summers:

> I feel the dean failed to represent all students . . . and that was a slap in the face because it told me

Harvard did not care if I went on to find a successful law career. I think Harvard University failed to protect all its students equally.

Exhibit 7.

29. I am not aware of any Harvard Law School students who joined the JAG Corps. at the end of the 2002-2003 academic year.

* * * * *

EXHIBIT 4 TO GERKEN DECLARATION

Harvard Law School allows military recruiters

MEMORANDUM

To: Harvard Law School Community
From: Dean Robert C. Clark
Date: August 23, 2002
Re: Military Recruitment

This academic year, for the first time since this School adopted a policy prohibiting discrimination on the basis of sexual orientation, the U.S. military will be allowed access to the facilities and services of the Law School's Office of Career Services ("OCS").

Because of the significance of this decision, I write to inform you of the history of this issue at the Law School and the path that led to this course of action.

At the outset, I would emphasize that the decision is the product of intense discussion and careful deliberation after the military raised the issue with new rigor this year. Regrettably, no reasonable alternative was available that could satisfy the disparate views on this issue. I have personally struggled with this issue, because I recognize the pain that some members of the community (especially our gay and lesbian students) will endure because of the change in practice. For many of us, a policy of nondiscrimination on the basis of sexual orientation reflects a fundamental moral value. There are numerous ways to express this value and pursue its implementation, however. Our decision to permit military recruiters access to the facilities and services of OCS does not reduce the Law School's

commitment to the goal of nondiscrimination on the basis of sexual orientation.

Our policy has long provided that any employer who recruits at Harvard Law School and utilizes the services of OCS must sign a statement indicating that it does not discriminate on various bases, including on the basis of sexual orientation. Because the military has not signed such a statement, it has not been permitted to utilize the services of OCS in the past.

At issue for several years, however, has been the interpretation of a federal statute commonly known as the Solomon Amendment. This statute, enacted in 1996, denies certain federal funds to an educational institution that "prohibits or in effect prevents" military recruiting. The regulations implementing the statute state that if an educational institution does not provide "requested access" to campus, the institution will lose its federal funds unless the institution can demonstrate "that the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers." 32 C.F.R. 216.4(c)(3).

In 1998, the Air Force asked us for information to determine whether we were in compliance with the Solomon Amendment. I responded at that time by pointing out that the military has been able to recruit effectively at the Law School via a different route—namely, the Harvard Law School Veterans Association ("HLSVA"), a recognized student organization. As you may know, any official student organization at the Law School may invite any person or organization onto campus. HLSVA has invited military recruiters and has facilitated their efforts at HLS. In 1998, after I explained our nondiscrimination policy for OCS and the practice of having the military recruit through HLSVA,

the Air Force determined that we were in compliance with the Solomon Amendment.

In December 2001, the Air Force made another inquiry on the subject. Our initial response mirrored the response we sent in 1998. However, although our practices had no changed since then, apparently the Air Force's interpretation of the Solomon Amendment had changed. On May 29, 2002, the Air Force notified me that it no longer views our policy as being in compliance with the law. The Air Force's letter said that unless the School showed by July 1, 2002 that our "policies and practices had been modified to conform with federal requirements" they would "forward this matter to the Office of the Secretary of Defense with a recommendation of funding denial."

In light of the Solomon Amendment, our refusal to permit military recruiters access to the services of OCS would make the entire University ineligible for appropriations from the Department of Defense, Transportation, Health and Human Services, Education and related agencies. The Law School does not receive significant federal funding, and or participation in federally sponsored student loan programs would not be at risk. The University, however, annually receives approximately $328 million from the federal government, which comprises approximately 16% of its operating budget.

Because our recruitment practices have implications well beyond the Law School, I went outside (as well as inside) the Law School to discuss this issue. In summary, I studied the matter with the University's General Counsel extensively over the summer, and I consulted with Harvard's President. I also met with the Law School Placement Committee and took counsel

from other faculty members and senior administrators of the Law School. At my request, the Placement Committee contacted the leadership of HLS LAMBDA, to inform them of the situation and solicit their input to our response. In reply to our request for more time to study the issue, the Air Force granted us a one-month extension, and on July 29th I informed the Air Force of our decision to permit military recruiters to use OCS.

In the end, the decision to allow military recruiters on campus was necessary because of the extraordinary impact a prohibition of recruitment would have had on the University. I believe that an overwhelming majority of the Law School community opposes any form of discrimination based upon sexual orientation. At the same time, most of us reluctantly accept the reality that this University cannot afford the loss of federal funds. To say that the decision was just about money trivializes its impact. At issue potentially were the fruits of the federal funds—students' educations, faculty's careers, significant medical and scientific research, and perhaps even cures to life-threatening diseases.

As a citizen, I am convinced that military service is both honorable and essential to the well-being of our country. I am deeply grateful for the sacrifices made by military personnel and the security and other benefits they provide to all of us. As Dean of Harvard Law School, I am also very proud of each and every graduate who has gone into military service, and I hope the number increases. Precisely because of this respect for military service, I believe that one way or another, all students should have access to these exceptional opportunities to serve their country.

This year and in future years, the Law School will welcome the military to recruit through OCS. Our hospitality, however, does not imply that we endorse all of the military's personnel policies. The Law School condemns the military's discriminatory practices and remains committed to the principle of equal opportunity for all persons, without discrimination on the basis of sexual orientation. We are dedicated not only to the rule of law, but also to the advancement of a just society.

Going forward, I will be working with the leadership of LAMBDA and other HLS student organizations, and with our faculty and administrators, to discuss constructive measures that the Law School can take in support of its nondiscrimination policy. A society that discriminates on the basis of sexual orientation—or that tolerates discrimination by its members—is not a just society. I look forward to the day when the armed forces, like other employers who recruit at the Law School, adhere to the most basic fundamental principles of equal opportunity and nondiscrimination.

EXCERPTS OF LAW DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ____

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICA LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, DEFENDANTS

DECLARATION OF SYLVIA A. LAW

I, Sylvia A. Law, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry at New York University School of Law ("NYU Law" or the "Law School"). I have been a member of the NYU Law faculty (the "Law Faculty") since 1973. In these thirty years, I have been attentive to issues of free speech, academic freedom, discrimination and equality. I make this declaration in my individual capacity as a member of the Law Faculty who has been witness to, and participant in, many of the facts I recount below. I do not speak for the Law School or the Law Faculty. If called as a witness, I could and would testify to the following based on personal knowledge, or if indicated, on information and belief.

2. In April 1977, the New York University Senate voted to include sexual orientation as a prohibited basis

of discrimination within the University itself. As amended, the Statement of Policy, applicable to the Law School, then read:

> New York University is committed to a policy of equal treatment and opportunity in every aspect of its relations with its faculty, students, and staff members, without regard to sex, sexual orientation, marital or parental status, race, color, religion, national origin, age or handicap.

3. The Law Faculty believes that the nondiscrimination policy was and is essential to the community's character and message. It is a declaration that invidious discrimination of any sort is immoral, including discrimination in employment decisions, and that human beings are to be judged on the merits of their accomplishments and ideas, and not on the basis of other unrelated characteristics.

4. The Law Faculty wanted more than just to pronounce the values in the nondiscrimination policy, it wanted to implement them in behavior that the Law Faculty hoped its students would follow in their law practices and lives as community leaders. In December 1977, the NYU Law School Placement Committee by a vote of 12 to 2 with 2 abstentions passed a resolution condemning discrimination in employment based on sexual orientation. That resolution stated:

> The NYU Law School is committed to a policy against discrimination in employment based on sexual orientation. The facilities of the Law School placement office [now the Office of Career Counseling and Placement or "OCCP"] shall not be available to employers whose practices are inconsistent with that policy.

A true and correct copy of this resolution is attached as Exhibit 1.[1] The Placement Committee requested that the Dean of the Law School pass that resolution on to the entire Law Faculty for its consideration and adoption.

5. The Law Faculty did vote to adopt the Placement Committee's resolution, and in 1978, NYU Law School became the first law school in the United States to deny access to placement services to employers who openly discriminate on the basis of sexual orientation. The 1978 policy was adopted over the opposition of the University Senate and Office of General Counsel.

6. In 1981, the Law Faculty applied the non-discrimination policy to an external actor, the Federal Bureau of Investigation. In a series of telephone conversations early that year, the NYU Law Office of Career Counseling and Placement ("OCCP") learned that the FBI would not hire homosexual Law School students or graduates. This practice was in direct conflict with the Law School's non-discrimination policy. Consequently, the OCCP responded by canceling all on-campus interviews conducted by the FBI. A true and correct copy of the letter from the OCCP canceling all on-campus interviews is attached as Exhibit 2.

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[1] In January 1978, the Placement Committee amended its resolution to state:

> The New York University School of Law is committed to a policy of equal treatment and opportunity in every aspect of its relations with its faculty, students, and staff members without regard to sex, sexual orientation, marital or parental status, race, color, religion, national origin, age or handicap. The facilities of the New York University School of Law placement office shall not be available to employers whose practices are inconsistent with that policy.

7. In 1990-91, a Chicago-based law firm was banned from on-campus recruiting because of a discriminatory question asked by that partner in an interview of a student at another law school.

8. In 1993, the Law Faculty voted to ban all Colorado law firms (or Colorado offices of national law firms) from on-campus recruiting to protest Colorado's passage of Amendment 2, which repealed existing, and prohibited future adoption of, Colorado statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation. When the Supreme Court struck down Amendment 2 as unconstitutional in *Romer v. Evans*, 517 U.S. 620 (1996), the Law Faculty permitted Colorado employers to return to on-campus recruiting events.

9. The anti-discrimination policy passed by the Law Faculty does not operate as a one-way valve, however. In 1982, the Law Faculty permitted the Navy to return to on-campus recruiting for a time because the Navy was able to affirm that it did not discriminate on the basis of sexual orientation. True and correct copies of a letter from the Navy to the Law School and a Placement Committee Resolution are attached as Exhibit 3.

10. In 1995, Congress enacted the Solomon Amendment, denying Department of Defense funding to institutions of higher education that prevented the military from recruiting on campus. In response, the Law Faculty continued to insist that all potential employers seeking to recruit on campus conform to the school's nondiscrimination policy.

11. As reflected by the nondiscrimination policy, the Law Faculty does not promote, and does not want to be considered as supporting, discrimination in any form.

Because the military refused to abide by the nondiscrimination policy, the Law Faculty refused to allow military recruiters to recruit on the Law School's campus. The Law Faculty did not wish to promote discrimination and did not want to be seen as expressly or tacitly sponsoring discrimination. The nondiscrimination policy is intended to insulate the Law Faculty from any perception that it is condoning the employer's discriminatory policy or subsidizing or endorsing it in any way.

12. In 1997, Congress extended the rule denying federal funds to universities and sub-elements of universities that denied access to military recruiters to grants and contracts provided by the Departments of Labor, Health and Human Services, Education, and Transportation.

13. In April 1998, the Law Faculty responded to this new rule by reaffirming our 1978 policy. We appreciated that the consequence of our continued commitment to non- discrimination was loss of some federal funds, *i.e.* about $75,000 in 1998-1999. Because of the sub-element rule, our decision to put principle above money had no impact on the University as a whole. We continued our tradition of leading American legal education on this vital human rights issue.

14. In March 1998, the Law School received an inquiry from the Army asking for clarification of the Law School's and the University's policies regarding on-campus military recruiting. A true and correct copy of the Army's letter is attached as Exhibit 4.

15. Although it did not permit the military to use the Law School's OCCP facilities or resources or to come onto the Law School campus to recruit, at that time the

Law School did not prohibit in any way its students from obtaining employment with the military. As then-Dean John Sexton explained to the Army's JAG recruiter in an April 16, 1998 letter:

> NYU School of Law students have the opportunity to meet with representatives of the various departments of the military (DOD) during the semi-annual Career Fairs held in early September and early April. Arrangements can be made through the NYU Office of Career Services . . . The School of Law Office of Career Counseling and Placement maintains an extensive career resource library and DOD literature regarding career opportunities available to interested students. In addition, the career counseling staff have a list of NYU law graduates in recent years who have pursued careers in the military so that they can refer interested students to them.
>
> The NYU School of Law on-campus recruiting facilities are available to employers who sign our no-discrimination policy—our records indicate that the various Department of Defense entities have not signed this statement.
>
> * * *
>
> We are confident that NYU School of Law students have reasonable access to the employment opportunities offered by the various military departments and we will continue to refer interested students as we have in the past.

A true and correct copy of Dean Sexton's letter is attached as Exhibit 5.

16. And indeed as late as the fall 1998 recruiting season, this policy more than met the needs of the military JAG recruiters. After conducting off-campus interviews of NYU Law students in the fall of 1998, one Army recruiter wrote to the OCCP and reported that competition had become so keen for JAG attorney positions in the last few years that even "very qualified applicants will not be selected for a position." A true and correct copy of the Army recruiter's letter is attached as Exhibit 6.

17. In February 1999, the Army again conducted off-campus interviews of Law School students and sent another thank you note to the OCCP. A true and correct copy of the Army recruiter's thank you note is attached as Exhibit 7.

18. On January 13, 2000, the Department of Defense adopted interim regulations, effective immediately, to define an institution of higher education to include all sub-elements of such an institution, thus eliminating the pre-existing policy that treated schools and colleges within a university as independent actors for purposes of determining whether financial sanctions would be applied to universities at which one school or college excluded military recruiters.

19. As explained in an email from the Dean to the Law Faculty, on May 23, 2000, the University Office of General Counsel instructed the Law School to allow the military access to on-campus recruiting facilities and also make student contact information available to the military. The decision was based, at least in part, on the fact that the NYU Medical School received approximately three million dollars in funding from the Department of Defense which, under the new regulations, might have been jeopardized if the Law Faculty

continued to enforce its non-discrimination policy. The director of the OCCP was instructed to grant "parity of access" to the military with regard to on-campus recruiting facilities, without requiring that they sign the customary anti-discrimination assurance. A true and correct copy of the email from the Dean to the Law Faculty is attached as Exhibit 8.

20. Thus, on October 16, 2000, for the first time in 22 years, the Law Faculty—pioneers in believing and expressing that discrimination against gays and lesbians was a moral wrong—had to suspend its non-discrimination policy and permit an employer who openly discriminated access to the facilities of the OCCP.

21. During that first academic year of on-campus military recruiting, the military scheduled four visits but canceled one because there was no student interest. Each of the remaining three visits, including one during a February 2001 public interest jobs fair (known as the Public Interest Symposium), was marked by fierce student protests. Events that occurred at protests at the February Public Interest Symposium in particular were extremely harmful to the community. The Symposium was held at NYU and attended by participants from 23 area law schools. As the NYU Law students protested outside the area where the Marines were interviewing students, they were verbally assaulted and harassed by students from other schools who hurled anti-gay epithets at the protestors. There was even a physical altercation, resulting in one student from another law school being banned from returning for the second day of interviewing.

22. Each time the military recruiters came to campus, the OCCP posted "ameliorative" statements advising students that the military recruiters had not

signed the non- discrimination policy usually required by the Law Faculty. Other ameliorative measures include letters from the Dean and the faculty to the community, distribution of educational materials, protest resolutions by the Student Bar Association, educational programs, festooning the Law School with rainbow bunting, and faculty and staff distribution of rainbow ribbons to students. The OCCP continues these practices whenever the military comes to campus.

23. In that first year of on-campus military recruiting, 98 members of the Law Faculty signed an open letter sharing their concerns about the presence of the military on campus:

> [Participation of a discriminatory employer in on-campus recruiting] compromises not only our long-standing conception of the academic freedom of a faculty of law to determine appropriate ethical standards for the recruitment of our students, but conscripts us into complicity with policies that unjustly degrade fellow persons. All our collective experience with struggles for elementary justice under law suggests now, as much as ever, our ethical need to resist familiar attempts to divide people of good will from a sense of their common humanity.

That letter was republished in the fall of 2002 and now bears 119 signatures. True and correct copies of these letters are attached as Exhibit 9.

24. Another divisive event also occurred during that first year of on-campus recruiting. After three students with interest in the military interviewed at one of the visits, anonymous posters appeared around campus with pictures of the three students bearing captions

suggesting the interviewees were complicit in the military's discriminatory policy.

25. As a result of the disruption caused by the military's visits, in March 2001, it was decided to ask the military to conduct two discrete days of on-campus interviewing each year (so-called "military days"), once in the fall and once in the spring. On military days, the OCCP does not permit the military to use the OCCP interview center to conduct its interviews, as most employers would be able to do. The interview center is located near numerous Law School business offices, including admissions, financial aid, and the OCCP itself as well as student residences. The inevitable protests that would accompany the military's interviewing would too severely disrupt the functioning of those offices to permit the military to use the OCCP interview center. On military days, therefore, military recruiters interview students in a space not usually used for OCCP interview programs but still on the Law School premises.

26. It was also decided that the military should not participate in Early Interview Week, an on-campus recruiting process that takes place over five days in August during which 14,000 interviews occur involving 340 employers, 750 interviewers, and 650 interviewees. Usually 90% of NYU Law students obtain jobs through Early Interview Week. Early Interview Week is a huge logistical challenge and stresses the resources even of a school like NYU Law.

27. It was further decided that the military should not again participate in the Public Interest Symposium held in the spring. Generally, most government employers do not participate in Early Interview Week but attend the spring Public Interest Symposium. If the

military participated in either the fall Early Interview Week or the spring public interest job fair, however, the inevitable student protests would throw both of those critical recruiting processes into disarray and overstretch the resources of the OCCP.

28. On May 9, 2001, the OCCP informed the military of these conclusions.

29. As planned, the OCCP held two military days in the 2001-02 academic year. The military declined to attend the fall military day because no students signed up to interview. Nine students interviewed with the military at the spring military day, which again was marked by vociferous student protests. The student protestors pushed into the interview area and physically tried to keep interviewees from gaining entry. OCCP personnel and campus security were forced to assist interviewees through the protests in order to attend their interviews. The divisive effect of the military's on-campus presence was not limited to the duration of the protests. One student informed the OCCP Assistant Dean that she had stopped going to class because her assigned seat was near one of the most outspoken and violent military interviewees; she simply could not learn in the atmosphere of tension that existed between the two students solely because of the military's presence on campus.

30. Because of the protests, some of the military recruiters have offered to interview students off campus. One recruiter interviewed a student in a nearby restaurant after that student informed the recruiter that she was uncomfortable crossing the protest line. Another recruiter, who serves in the armed forces reserves, offered to interview interested students at his offices in New York City where he conducts his civilian

law practice. Another recruiter has offered to interview interested students who were willing to drive to the military base where she was stationed.

31. The military was apparently satisfied with the results of the spring 2002 military day. By letter dated February 15, 2002, the Army JAG Corps representative who attended the February recruitment event thanked the OCCP for the opportunity to interview interested candidates. The letter noted: "Competition has become very keen in the past few years for both our intern and JAG attorney positions. Unfortunately, that means some very qualified applicants will not be selected for a position. Please relay to your students that non-selection does not reflect negatively on their qualifications." A true and correct copy of the Army recruiter's letter is attached as Exhibit 10.

32. Despite the surfeit of "very qualified applicants," some parts of the military were seemingly still unhappy with the military day accommodations made by the Law Faculty and continued to press for greater access to its recruiting processes. On information and belief, in late 2001 and again in late May 2002, the military threatened NYU with the loss of funds unless the Law Faculty allowed the military access to on-campus recruiting equal to that of a non-discriminating employer, despite the fact that the military did not, and does not, comply with our anti-discrimination policy. Upon information and belief, since December 2001, the military has continued and escalated its pressure on NYU and the Law School to grant the military recruiters unfettered access to Law School students for the purposes of recruiting.

33. On September 12, 2002, Dean Richard Revesz addressed the Law School community in an email

regarding the impending fall 2002 military day. Dean Revesz first assured the community that the Law School's non-discrimination policy was not an expression of anti-military bias. Rather, he wrote:

> For decades, America's top law firms and law schools have banned discrimination on the basis of sexual orientation, with the result that they are better able to fulfill their professional and educational tasks. . . . I recognize that this policy causes great pain to our gay, lesbian, bisexual and transgendered students. Further, it is deeply offensive to the great majority of those in the NYU Law School community that believe it is irrational and immoral to discriminate against qualified people because of their sexual orientation. . . .
>
> As NYU Law School recognized in 1978, a society that discriminates on the basis of sexual orientation —or that tolerates such discrimination against qualified people—is not just. I look forward to the day when the armed forces, like other employers who recruit at the Law School, adhere to principles of equal opportunity and nondiscrimination.

Dean Revesz the stated it was not his intention that the Law School simply surrender to the military; rather he stated "[g]oing forward, I am prepared to work with all student groups . . . and with faculty and administrators to discuss constructive measures that the Law School can take in support of its nondiscrimination policy." A true and correct copy of Dean Revesz' email is attached as Exhibit 11

34. By letter dated September 19, 2002, John Sexton President of the University directed Dean Revesz to "provide recruiters from the Armed Forces equal

access to the School of Law students and placement and career events and facilities as is afforded to other government agencies and civilian employers." President Sexton stated that he reached this decision because of the military's newly adopted position that the Solomon Amendment mandates "schools and colleges to accord military recruiters the same treatment and access to students as is accorded non-military employers recruiting on their campuses." Thus, he concluded he could not take the risk that the University would lose $130 million in federal funding, despite his belief that "a policy of nondiscrimination on the basis of sexual orientation reflects a fundamental moral value." A true and correct copy of President Sexton's letter is attached as Exhibit 12.

35. In the 2002-03 academic year, the OCCP again held two military days during which the military conducted on-campus interviews of Law School students. Again, each military visit was marked by student protests and solidarity demonstrations conducted by students, staff members, and faculty. In the 2003-04 academic year, the military is scheduled to interview on campus on October 17, 2003, and February 6, 2004.

36. Despite the ameliorative measures taken by NYU Law, the Law Faculty statements, and the Deans' letters to the Law School community, the Law Faculty's anti- discrimination message of common humanity and dignity has been garbled by the Solomon Amendment. One former NYU Law student, who came to NYU precisely because of its long history of clearly expressed commitment to dignity and equality, grew mistrustful of the Law School and lost belief in the sincerity of the Law School's expression of its anti-

discrimination beliefs. He voiced his confusion and concern in a letter to the Dean of the Law School:

> The message I have received over the last two years is that although sexual orientation has been listed in our non-discrimination policy for over two decades, gays and lesbians are *not* regarded as full and equal members of our community. They represent a segment of the law school community which is not deserving of the same level of protection in recruitment as other groups. The trauma suffered by this group as a result of attending a law school which is now an active instrument of their mistreatment and exclusion, is not regarded as something the law school needs to be very concerned about, except in the case where it might jeopardize its accreditation. The pain and suffering of all (and I do mean *all*—for we have all to some degree been poisoned by distrust, bitterness and disappointment that necessarily accompanies discrimination) members of this community are not sufficient enough to compel the dean's presence at any forum dedicated to address this issue. I would be very curious to see how the same situation would have been handled if it had been another 'protected' group's equality of opportunity at stake.

A true and correct copy of this student's letter is attached as Exhibit 13.

37. Another student, who was interested in interviewing with the military, reluctantly canceled his interview with a JAG Corps recruiter because of the pressure exerted on him by student groups not to participate in the on-campus interview process and his misperception that the OCCP disfavored students

applying for military jobs. He also expressed his frustration that students willing and able to serve their country were prevented from doing so by what he perceived as the military's refusal to conduct off-campus interviews of NYU Law School students.

38. The military's participation in on-campus recruiting seems to have had little effect on its ability to attract successful recruits from NYU Law. From the graduating classes of 1995 through 2001, before the Law Faculty excepted the military from its nondiscrimination policy, the armed forces hired six Law School graduates for permanent positions. Of course, none of these graduates was hired from on-campus recruiting. Additionally, the armed forces hired one summer intern during that time who likewise was recruited through off-campus interviewing. The military hired four graduates from the classes of 2002 and 2003, but only one of those graduates came to the military through the military's on-campus recruitment process.

39. Despite devoting considerable effort to amelioration, the adverse effects of allowing discriminatory recruiters to participate in on-campus recruiting events cannot be cured. We believe that the most effective way to communicate clearly our belief in the dignity, equality, and common humanity of all persons, regardless of sexual orientation, is to return to the Law Faculty's previous policy of excluding all discriminating employers, including the military, from the use of OCCP facilities, resources, and services. Were it not for the threatened loss of federal funds to the University, the Law Faculty would do so.

* * * * *

EXHIBIT 1 TO LAW DECLARATION

To: Norman Redlich

From: Howard Greenberger

The Placement Committee, by a vote of 12 to 2 with 2 abstentions, passed the following resolution at its meeting of December 1, 1977:

> The NYU Law School is committed to a policy against discrimination in employment based on sexual orientation. The facilities of the Law School placement office shall not be available to employers whose practices are inconsistent with that policy.

The Committee wishes to have this resolution presented at the next Faculty Meeting and recommends that the Faculty adopt it notwithstanding any other general University policy statements in this area.

EXHIBIT 3 TO LAW DECLARATION

DEPARTMENT OF THE NAVY
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20360

26 May 1981

Mr. Michael Magness
Placement Director
New York University
School of Law
40 Washington Square South
New York, New York 10012

Dear Mr. Magness:

All hiring and advancement in the Office of the General Counsel is based on merit without regard to race, color, national origin, religion, age, sex, sexual orientation, handicap, political affiliation or marital status.

This statement is furnished per your request, so that we may interview at your University.

Thank you for your assistance.

Sincerely,

/s/ ROBINWYN D. LEWIS
ROBINWYN D. LEWIS
Assistant to the General Counsel

November 18, 1981

After review of the correspondence between the Placement Committee and the Assistant to the General Counsel of the Office of the General Counsel of the Department of the Navy and the official pamphlet of that office, entitle *Career Opportunities as a Civilian Attorney for the Navy* (NAVSO P- 3556, dated July 1981), the Placement Committee voted to permit the Office of the General Counsel of the Department of the Navy to interview on campus (In favor of the action: 7; opposed to the action: 0; abstaining: 1). This action is meant to apply solely to the Office of the General Counsel, Department of the Navy, and does not change our previous action barring the Judge Advocate General's Corps, Department of the Navy, from interviewing on-campus at New York University School of Law.

EXHIBIT 6 TO LAW DECLARATION

DEPARTMENT OF THE ARMY
UNITED STATES ARMY
LEGAL SERVICES AGENCY
901 NORTH STUART STREET
ARLINGTON, VA 22203-1837

Seal REPLY TO ATTENTION OF: November 3, 1998

New York University School of Law
Ms. Irene Dorzback, Assistant Dean
40 Washington Square South
New York, New York 10012-1099

Dear Ms. Dorzback,

Thank you for posting on the email my scheduled trip to the New York area to interview law students interested in the US Army Judge Advocate General's Corps (JAG Corps). I am happy to report that two of my strongest candidates are students at NYU.

I was impressed with the qualifications and professional demeanor of all of the students at your school with whom I had the opportunity to speak. Competition has become very keen in the past few years for both our intern and our JAG attorney positions. Unfortunately, that means some very qualified applicants will not be selected for a position. Please convey this information to your students and assure them that non-selection does not reflect negatively on their qualifications. This is especially true for the summer intern positions.

Again, on behalf of the Army JAG Corps, thank you for announcing my visit. I am looking forward to my next visit to New York in February, 1999, and hope that you will once again help publicize my presence.

Sincerely,

/s/ STEVEN H. LEVIN
STEVEN H. LEVIN
US Army, Judge Advocate
Recruiting Officer

EXHIBIT 7 TO LAW DECLARATION

Office of Counsel
3101 Park Center Drive
Alexandria, VA 22302-1695

U.S. ARMY AUDIT AGENCY

FAX

To: Irene Dorzback	From: Chad Sarchio
Fax: 212-995-7076	Pages: 4
Phone:	Date: 23 Feb. 99
Re:	cc:

☐ Urgent ☒ For Review ☐ Please Comment

☐ Please Reply ☐ Please Recycle

Comments:

Again, I appreciate all your time and efforts in assisting me with this round of interviews. Your students were a pleasure to speak with and have impressive credentials. Perhaps in the future "logistics" will become less of problematic.

Please place a copy of the following article in your resource folder for the Army JAG. I discussed it with several students, and it provides interesting insight into the JAG's "reputation" in the profession.

Thanks again for your help, and look forward to meeting you next fall if schedules permit.

EXHIBIT 9 TO LAW DECLARATION

[Seal] **New York University**
A private university in the pubic service

School of Law
40 Washington Square South
New York, New York 10012-10099

October 18, 2000

The Administration has informed the faculty that "for the first time in 22 years, an employer who openly discriminates against gay and lesbian people will be allowed access to the facilities of the Law School Placement program." The undersigned members of the faculty of the New York University School of Law write to share with you our concerns regarding this change of policy. We deplore the military policy that requires this change. It compromises not only our longstanding conception of the academic freedom of a faculty of law to determine appropriate ethical standards for the recruitment of our students, but conscripts us into complicity with policies that unjustly degrade fellow persons. All our collective experience with struggles for elementary justice under law suggests now, as much as ever, our ethical need to resist familiar attempts to divide people of good will from a sense of their common humanity.

[Signatures Omitted]

EXHIBIT 10 TO LAW DECLARATION

DEPARTMENT OF THE ARMY
UNITED STATS MILITARY ACADEMY
WEST POINT, NEW YORK 10996

[Seal] [Seal]
REPLY TO
ATTENTION OF

February 15, 2002

Ms. Irene Dorzback
Asst. Dean, Career Counseling & Placement
100 West 3rd Street
New York, NY 10012-1074

Dear Dean Dorzback,

Thank you for the opportunity to interview NYU students interested in the United States Army Judge Advocate General's Corps on February 8th. I appreciate your office's help in arranging the interviews. I was very appreciative of the welcome I received from your office, particularly under the circumstances.

Despite the protests, I feel the trip was a success. I was impressed with the qualifications and professionalism of those that interviewed. They all seemed well prepared for their interviews, which is a great reflection of your program.

Competition has become very keen in the past few years for both our intern and JAG attorney positions. Unfortunately, that means some very qualified appli-

cants will not be selected for a position. Please relay to your students that non-selection does not reflect negatively on their qualifications.

Again, on behalf of the Army JAG Corps, thank you for your hospitality.

Sincerely,

/s/ CRAIG E. MERUTKA
CRAIG E. MERUTKA
Major, U.S. Army
Field Screening Officer

EXHIBIT 11 TO LAW DECLARATION

TO: Law School Community

FROM: Richard Revesz

DATE: September 12, 2002

RE: Military Recruiting and Discrimination Against Gay and Lesbian People

On October 18, 2002, recruiters from the U.S. Department of Defense (DOD) will use the Law School's Office of Career Services to interview students seeking employment opportunities. Military policy excludes qualified applicants who are openly lesbian, gay, bisexual or transgendered.

We are proud that in 1978, NYU Law School became the first law school in the United States to deny its placement services to employers who discriminate on the basis of sexual orientation, in addition to earlier policies that prohibited discrimination on the basis of race, gender, religion, national origin or disability. In response to the leadership of NYU Law School's former Dean John Sexton, in 1990 the Association of American Law Schools resolved that accredited law schools in the United States could not aid employers who discriminate on the basis of sexual orientation.

The anti-discrimination policies of NYU and other U.S. law schools are not targeted at the military, but they apply equally to all employers. Our anti-discrimination policies reflect no disrespect for the military or its lawyers. It is in no way unpatriotic. For decades, America's top law firms and law schools have banned discrimination on the basis of sexual orientation, with the result that they are better able to fulfill their professional and education tasks. Further, the

Office of Career Counseling and Placement provides information about off-campus interviews for students who seek job opportunities with the military.

Since 1995, the federal Solomon Amendment has denied DOD funds to schools that do not allow military recruiters. Because NYU Law School receives no funds from the DOD, that posed no problem for us. In 1997, Congress expanded the Solomon Amendment to deny funding from the Departments of Labor, Health and Human Services, Education and Transportation to schools that do not allow military recruiters. Despite the loss of $75,000 in Federal Pell Grants, NYU Law School reaffirmed our anti-discrimination principle and continued to deny access to discriminatory recruiters. When our own law school money was on the line, we were willing and able to support principle on this vital human rights issue.

In 2000, the DOD reinterpreted federal law to say that if any part of a university denied access to military recruiters, the entire university would lose all federal funds. Other parts of NYU receive substantial federal funds. NYU, through its Office of General Counsel, instructed the Law School to comply with the DOD demands, to suspend our general anti-discrimination policy and allow the military access to on-campus interview services of the Office of Career Counseling. Out of concern for the funding needs of the important, federally funded work of our colleagues in other schools, we have compiled with the instruction from the University.

I recognize that this policy causes great pain to our gay, lesbian, bisexual and transgendered students. Further, it is deeply offensive to the great majority of those in the NYU Law School community that believe

it is irrational and immoral to discriminate against qualified people because of their sexual orientation.

Going forward, I am prepared to work with all student groups, including SQUAD and OUTLAW, and with faculty and administrators to discuss constructive measures that the Law School can take in support of its nondiscrimination policy.

The Placement Committee has organized a program, "Military Discrimination Against Gay and Lesbian People: NYU Law School's Responses," which will take place Monday, September 23, at 4:00 p.m., in Room 210. Prof. David Richards will moderate a panel that includes Richard McKewen, '01, Peyton McNuff, '02, and Robert Sweeney, '02. The panel of recent law school graduates has studied these issues in an academic context and provided important moral and political leadership in the Law School.

On October 18, when the military recruiters are on campus, the Law School will offer members of the community a simple means to express disapproval of the military policy. Ribbons will be available at the Guards' Desks in Vanderbilt and in the School's offices at Butterick for those who would like to affirm opposition to discrimination against gay, lesbian, bisexual and transgendered people.

As NYU Law School recognized in 1978, a society that discriminates on the basis of sexual orientation —or that tolerates such discrimination against qualified people—is not just. I look forward to the day when the armed forces, like other employers who recruit at the Law School, adhere to principles of equal opportunity and nondiscrimination.

EXCERPT OF MALIGNO DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

---

03 Civ. ___

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, DEFENDANTS

DECLARATION OF THOMAS MALIGNO

I, Thomas Maligno, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Director of Career Development at Touro College Jacob D. Fuchsberg Law Center. If called as a witness, I could and would testify to the following based on personal knowledge, or if indicated, on information and belief.

2. In November, 1994, the Touro faculty voted to formally adopt a single uniform statement of the school's non-discrimination policy. The minutes from that meeting state:

> "Non-Discrimination Policy.
> Professor Eileen Kaufman noted that, while the school has a non-discrimination policy, which is expressed in various publications, she had been unable to find a single uniform statement of the policy.

After a brief discussion, the following statement was adopted unanimously:

> It is the policy of Touro College Jacob D. Fuchsberg Law Center not to discriminate on the basis of race, color, religious, national origin, sex, age, handicap or disability, marital status, or sexual orientation. This policy applies to admissions policies, educational programs, employment practices and other activities sponsored by the Law Center. The Law Center complies with all applicable federal, state and local laws relating to discrimination, and engages in affirmative action efforts to provide a full opportunity for the study of law and entry into the profession by qualified members of groups that have been victims of discrimination in the past."

3. In 1997, Congress extended the rule denying federal funds to universities and sub-elements of universities that denied access to military recruiters to grants and contracts provided by the Department of Labor, Health and Human Services, Education, and Transportation. In October, 1997, Touro Law School responded to this new rule by reaffirming our policy. In the course of the discussion Dean Glickstein indicated that, even if the faculty voted to reaffirm its policy and continue to bar military recruiters, he might be obliged, on advice of College counsel, to permit the military to conduct interviews at the Law School.

4. In a January 1998 letter to the faculty Dean Glickstein wrote, "I discussed the issue with President Lander, advised him of the strong views of our faculty, and told him that I concur in condemning the military's discrimination on the basis of sexual orientation. President Lander was deeply concerned about possible dam-

age to the Law School's fiscal health and jeopardizing public funding for our Central Islip move. He directed that we grant the military's request to conduct interviews at the Law School. I want to emphasize that this concession does not diminish the Law School's commitment to nondiscrimination based on irrelevant personal characteristics. We are opposed to discrimination based on sexual orientation and welcome persons to our community regardless of their sexual orientation. As George Washington said in writing to the congregation of the Touro Synagogue in Newport, Rhode Island:

"To bigotry no sanction. To persecution no assistance."

5. In 1998, when military recruiters came on campus at Touro, they met with large boisterous protests. Although the protests were peaceful and lawful, many students were so intimidated by having to confront this uncomfortable situation that they decided not to purse the interview process (during this time our Career Planning Office was always supportive of the students and their right to interview). The students' reluctance to participate in future on-campus military recruitment led the staff of the Career Planning Office to seek an alternative location. We realized that many of our students wanted the opportunity to interview with and work for the military.

6. While all other on-campus interviewing was conducted at the Law Center, in 1999, 2000 and 2001 our military interviews were held at the offices of the Family Service Association, a respectable not-for-profit that is five minutes from the Law Center. This is an agency where many of our clinical and pro bono students represent clients on legal matters, therefore not foreign to Touro.

6.1 The Family Service Association building was chosen for its relationship with and proximity to the Law Center.

6.2 While using the Family Service Association, our Career Planning Office had informed all military recruiters that we were requesting, but not demanding that they conduct interviews at Family Service. All had agreed and the process appears to have worked for all concerned.

6.3 We avoided the "intimidation" atmosphere that has developed at other schools and our students expressed their appreciation for that. We believe the number and quality of our students participating in military recruitment spoke for itself and that the alternative site was at least equal in quality and scope to the access provided to other employers.

6.4 All military recruiters were welcomed in the Law Center building, meeting a CPO staff member to prepare for the interviews. In addition, all military recruiters were invited to have lunch with CPO staff (and at times professors), at the school or in a restaurant and many have accepted our invitation.

7. In December 2001, Touro College President, Bernard Lander, received an inquiry from the Army asking for clarification of the Law School's and the University's policies regarding on-campus military recruiting. See exhibit 1.

8. In December 2001, Dean Glickstein responded on behalf of the Law School:

In that letter, the Dean wrote that although we believed it was best for military interviewing to occur off

campus we would comply with the military recruiters requests to interview on campus. See exhibit 2.

9. In a May 2002 letter from the office of the Judge Advocate General, Dean Glickstein was informed that Touro would only be considered in compliance if military recruitment occurred on campus. See exhibit 3.

10. In 2002, all military recruitment did occur on Touro's campus.

11. The enclosed article describes Touro's response to these 2002 on campus recruitment visits. See exhibit 4.

12. In 2003, for the 2nd year in a row, the Law School suspended its non-discrimination policy and will permit military recruiters to conduct on-campus interviews of law students. These interviews are set for October 2003.

* * * * *

EXHIBIT 2 TO MALIGNO DECLARATION

December 20, 2001

Daniel B. Fincher, Colonel, USAF
HQ USAF/JAX
1420 Air Force Pentagon
Washington, D.C. 20330-1420

Dear Colonel Fincher:

Dr. Bernard Lander has asked me to respond to your letter regarding Touro Law Center's policy with respect to military recruiting on campus. We appreciate this opportunity to clarify our policy.

Our Career Planning Office has long enjoyed a positive working relationship with our Air Force Recruiter. This is also true of our relationship with the other branches of the service that recruit Touro students. This productive relationship has resulted in many Touro Students participating in the military recruitment process. Over the past few years, the process has also resulted in Touro students being offered and accepting positions with JAG and in the JAG summer programs. They include Peter D. Galindez, Michael Larson, Byron Divins, Joseph Fairfield, Michael Kanabrocki, Darren Wall, David Lee Willson, Larry Mark Dash, and Carla A. Simmons.

Touro's policy concerning military recruitment was developed to provide students who are interested in interviewing a convenient productive process.

As you are aware, military hiring practices have been controversial on law school campuses across the country. In 1998, when military recruiters came on campus at Touro, they met with large boisterous protests.

Although the protests were peaceful and lawful, many students were so intimidated by having to confront this uncomfortable situation that they decided not to pursue the interview process. (during this time our Career Planning Office was always supportive of the students and their right to interview.) The students' reluctance to participate in future on-campus military recruitment led the staff of the Career Planning Office to seek an alternative location. We realized that many of our students wanted the opportunity to interview with and work for the military.

While all the other on-campus interviewing is conducted at the Law Center, our military interviews are held at the offices of the Family Service Association, a respectable not-for-profit that is five minutes from the Law Center. This is an agency where many of our clinical and pro bono students represent clients on legal matters, therefore not foreign to Touro.

The Family Services Association building was chosen for its relationship with and proximity to the Law Center.

Since first using the Family Service Association, our Career Planning Office has informed all military recruiters that we were requesting, but not demanding, that they conduct interviews at Family Service. All have agreed and the process appears to have worked for all concerned.

We have avoided the "intimidation" atmosphere that has developed at other schools and our students have expressed appreciation for that. We believe the number and quality of our students participating in military recruitment speaks for itself and is evidence that the

alternative site is at least equal in quality and scope to the access provided to other employers.

All military recruiters are welcomed in the Law Center building, meeting a CPO staff member to prepare for the interviews. In addition, all military recruiters are invited to have lunch with CPO staff (and at times professors), at the school or in a restaurant and many have accepted our invitation.

As you are aware, the AALS requires law schools to maintain that employers who interview at law schools sign a non-discrimination pledge. Since the military cannot do so, due to congressional mandate, the AALS requires ameliorative action to be taken when the interview occurs. We are aware that at other schools the actions include programs, teach-ins and demonstrations critical of the military. These actions are accompanied by posters throughout school buildings and buttons worn by students and faculty, also critical of the military hiring practices. Although we are prepared to adopt these measures (as AALS requires) should you insist on interviewing on campus, we believe our current practice meets the requirement of 32CFR 216.4 (c)(3) while simultaneously satisfying our students desire to have a dignified, productive interview process.

Touro has never trivialized the process like other schools that have set up separate military interview sites miles from campus, in remote inaccessible locations in unattractive out of the way places or in leaky basements. FSL was thoughtfully chosen because of its proximity to campus, its relationship to the school and the quality of the space available.

We are proud of our alumni who have served in the JAG Corps. I am sending you a photocopy of a page

from our latest alumni magazine. As you can see, it prominently features two of our alumni presently serving in the JAG Corps.

You can be assured that at all times military recruiters and prospective interviewees are treated with as much dignity and respect as all employers by our CPO staff. It is for these reasons that we believe that we are in compliance with the regulations concerning military access to our school and students. It is our desire to comply with these regulations.

Shortly after the New Year, the Vice Dean of the Law Center, Gary Shaw, will call you to follow up on this matter. He will be glad to discuss your concerns and make sure that you are satisfied with the arrangements that we have made. I hope that you will agree that we are in compliance with the regulations concerning military access to our school and students.

Sincerely,

Howard A. Glickstein
Dean

EXHIBIT 3 TO MALIGNO DECLARATION

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, DC

29 May 2002

HQ USAF/JAX
1420 Air Force Pentagon
Washington, DC 20330-1420

FEDERAL EXPRESS

Dean Howard A. Glickstein
Touro College of Law
300 Nassau Road
Huntington NY 11743-1239

Dear Dean Glickstein

This replies to your letter dated 20 December 2001, which responded to our earlier request that you clarify your institution's policy regarding military recruiting on your law school campus.[1] Based on your letter and our conversation, if the law school allows military recruiters to interview at the law school, your institution will be in compliance with federal law with respect to equal access to your law school for military recruiting.

We are fully aware of the ameliorative actions that the Association of American Law Schools encourages law schools to take in opposition of the federal law and regulations that allow military recruiting. Ameliorative actions that intimidate interested students and, in effect, prevent military recruiting on campus would be contrary to requirements of the law.

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[1] Letter dated 17 December 2001.

We appreciate your cooperation and support and look forward to working with you, your school, and your students in the future. If you have any questions, please contact us at (703) 614-3021.

Sincerely,

/s/ DANIEL B. FINCHER
DANIEL B. FINCHER, Colonel, USAF
Chief, Professional Development Division
Office of The Judge Advocate General

cc: Dr. Bernard Lander

EXCERPTS OF MASTASAR DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ____

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, ET AL., DEFENDANTS

DECLARATION OF RICHARD MATASAR

I, Richard A. Matasar, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Dean and President of New York Law School ("NYLS" or the "Law School"). I have been Dean and President here since 2000. Prior to that time, I have served as the Dean and Levin, Mabi & Levin Professor of Law at University of Florida Fredric G. Levin College of Law, Dean and Professor of Law at Chicago-Kent College of Law, and Associate Dean for Academic Affairs and Professor of Law at the University of Iowa College of Law. If called as a witness, I could and would testify to the following based on personal knowledge, or if indicated, on information and belief.

2. I make this declaration in my personal capacity, not as a representative of NYLS.

NYLS and September 11, 2001

3. NYLS sits at the intersection of Worth and Church Streets in lower Manhattan. The campus is just eight blocks from the former World Trade Center site.

4. No other law school in the United States bore the brunt of the catastrophic events of September 11, 2001 quite like NYLS.

5. As the towers crumbled on September 11 and the world changed, I wrote a letter, disseminated then and now posted on NYLS' website, to the Law School community:

> It is with great sadness that I write this message. As I look out of my office window I can see the smoke and debris from the Trade Towers. There is no worse feeling than the helplessness that comes from being close, but unable to help. Many of us have colleagues, family, and friends who work in the Towers. We are fearful that they may be lost, grateful for the escape of others, and thankful for the tireless efforts of the rescue workers.

A true and correct copy of my letter as it appears on the NYLS website is attached as Exhibit 1.

6. In the midst of the devastation, I looked forward to the future I would face as a teacher, lawyer, and citizen:

> Our country and profession will be challenged in unprecedented ways. Our emotions cannot and should not be checked. Rather we must channel them to do what is right. We will be challenged by changes in our civil life—security measures, inconveniences to daily living, fear, and pleas for revenge. My hope is

for our leaders to show courage, and to respond swiftly and in a measured way. For the rest of us—New Yorkers, Americans, and all members of the legal profession-let us use every tool at our disposal to help bring our community together to respond to a shared national catastrophe.

Exhibit 1.

7. A few days later, as the full impact of the devastation began to sink in for us, I again addressed this community, in a letter that is also now posted on the NYLS website:

Our world has been shattered. All of us have suffered incalculable losses-of family, friends, colleagues, and fellow citizens. The peace that we have come to expect as our birthright has been broken, perhaps forever. Nothing any of us can say or do can restore what was; we only can look forward and do what we can to come back stronger than ever. Our Mayor certainly has it right: Americans and New Yorkers are tough and compassionate people, dedicated to moving forward, rebuilding, and safeguarding our democratic values even in the face of the most difficult challenges.

* * *

What separates our society from others is our extraordinary commitment to the rule of law. Over the next few months our most cherished beliefs will be challenged. We must resolve to double our efforts (and then double them again) to bring order out of chaos and use every legal means to find and then punish those responsible. More fundamentally, as members of a helping profession, we must do all

we can to bring our community back as strong as ever. I often say that at New York Law School we "Learn Law and then Take Action." Now is our time to do both.

A true and correct copy of this letter as it appears on the NYLS website is attached as Exhibit 2.

8. NYLS was closed for two weeks after the September 11 attacks. When classes resumed Professor Nadine Strossen addressed her students in a statement, excerpts of which are found on the NYLS website:

> Along with other leaders of the ACLU—and an unprecedentedly broad, diverse coalition we organized of other groups from across the political, religious, and ethnic spectrum—I have been working with government officials to ensure that we who have the good fortune to live in this great city, and in this great country, can continue to enjoy both safety and freedom. Our paramount concern for protecting human life should not—and need not—come at the cost of fundamental human rights for everyone in this country, including non-citizens, and including people of every ethnic and religious background.
>
> As you know, many important issues of constitutional law are now affecting our lives more directly, and differently, since the horrific September 11 attacks. Since September 11, I have been addressing these issues non-stop with civil rights leaders, government officials, and media representatives. I look forward to discussing them with my students in the courses I'll be teaching next semester, Constitutional Law II and Advanced Constitutional Law & Appellate Advocacy. I also look forward to seeing and talking with many of you this semester.

A true and correct copy of Professor Strossen's comments as they appear on the NYLS website is attached as Exhibit 3.

9. On the sixth-month anniversary of September 11, I reflected in another statement to the NYLS community:

> We understand to the core that we may be knocked down, but we can get up and move forward. We know that our voices cannot be silenced, that patriotism does not mean giving up cherished liberties, and that supporting our leaders means cheering them when they are right, questioning them when we do not understand, and criticizing them when they are wrong.

A true and correct copy of my statement as it appears on the NYLS website is attached as Exhibit 4.

10. Despite initial feelings of helplessness, NYLS faculty, staff, and students found ways to help. The NYLS community dedicated itself to assist in rebuilding the city after the events of September. To channel its efforts to help the many in the community who had suffered economic hardship and dislocation as a result of the attack on the World Trade Center, the Law School established the New York Law School Community Fund. Contributions were made by faculty, staff, and students. And even before the resumption of classes, members of the Law School community committed themselves to an active public service response. Associate Dean Stephen Ellmann organized a coalition of clinical law teachers, members of the bar, and leaders of public interest organizations to identify public-service legal needs arising from the disaster. The Law School developed two programs to help small busi-

nesses and families deal with legal problems connected to the attack. Throughout the months that followed, NYLS made its resources available to displaced lawyers from the community and to various community organizations.

NYLS And Non-Discrimination

11. The values I expressed along with Professor Strossen—the importance of adherence to principle, the need to stand up for cherished beliefs, the value of skepticism and principled dissent, and a strong commitment to the enforcement and protection of fundamental human rights—in the wake of September 11 run deep at NYLS. They are integral to our educational mission.

12. My statement to prospective students posted on the NYLS website captures these values:

> We have a deep commitment to innovation, diversity, and integrity that calls for students devoted to becoming true professionals.
>
> * * *
>
> New York Law School students and faculty are passionately devoted to using law as a tool to improve the justice system, make our government stronger, and ensure that the economic system functions effectively and fairly. We say: "Learn Law. Take Action."
>
> * * *
>
> Law and justice are meant to go together. . . . At New York Law School, issues of justice are at the core of our mission; our students must be willing to accept the challenge of more clearly defining a just

> system. We teach technique; we also kindle spirit and foster devotion to professional ideals. Our imperative should be that of every lawyer: take good intentions and make them a way of life.

A true and correct copy of my statement to prospective students as it appears on the NYLS website is attached as Exhibit 5.

13. I know that it is critically important to nurture an environment in which each student feels welcome, will thrive, and will enrich the intellectual community through active participation. A key to that environment is our uncompromising adherence to the principle that all those who engage in discourse within the community are fully equal, and must be judged on the basis of their character, merits, and accomplishments, and not on the basis of race, creed, color, religion, national origin—or sexual orientation. As an educator, I know that, by communicating through word and deed to students, a law school can create an environment that reflects the values of equal participation and non-discrimination that are critical to the educational mission.

14. NYLS has long repudiated discrimination on the basis of race, color, religion, gender, sexual orientation, marital or parental status, national origin, age or handicap. The faculty, the pedagogical leaders of the Law School, instituted this policy. The rationale of a non-discrimination policy is that no person should face discrimination for a personal attribute—whether race, religion, sexual orientation, or other characteristic—that has no bearing on an individual's internal worth, the quality of his or her mind, or his or her ability to succeed in a particular post or assignment. Indeed, individuals with a diversity of backgrounds enrich the discourse and educational energy in a classroom and

throughout the institution. Such individuals will not participate freely unless their school accords them equal respect, dignity, and protection from discrimination.

15. Non-discrimination is a touchstone for every aspect of academic, social, cultural and political life at NYLS. The non-discrimination policy governs admissions, scholarships, grades, and staff and faculty hiring and promotion.

16. Starting in 1983, NYLS faculty expressed and lived out its commitment to non-discrimination by instituting a policy that the facilities of the Office of Career Services would be available only to employers whose practices are consistent with that policy of non-discrimination. I believe that abetting a discriminatory employer's recruiting efforts undermines the values of the Law School. The military, as a discriminatory employer, could not use the facilities of NYLS Office of Career Services throughout the rest of the 1980s and most of the 1990s.

17. NYLS' non-discrimination policy does not reflect disrespect or disregard for the military—no law school in the nation is more painfully aware than NYLS of the importance of national security—but rather an affirmation that qualified applicants should be judged on their merits, rather than on factors unrelated to their ability to perform their jobs. This policy is also of the greatest importance because of the central role the American legal profession plays in the functioning of American democracy which rests on the rule of law, at the heart of which is the constitutionally guaranteed promise of equal protection of the laws. As I put it in a statement to the NYLS community that now appears on the NYLS website: "in the view of America's law

schools, the institutions charged with educating legal professionals, [the military's discriminatory hiring practice] is wrong as applied to the hiring of lawyers." A true and correct copy of my statement to the NYLS community as it appears on the NYLS website is attached as Exhibit 6. This non-discrimination policy expresses the commitment to, and support for, the notion that the American legal profession must be open to all Americans who have the desire and ability to be lawyers.

NYLS And The Solomon Amendment

18. In 1997, the military actively used the Solomon Amendment to threaten law schools with a loss of federal student financial aid. An associate dean at NYLS estimated that the potential loss to the Law School's students was $2.1 million and that there was no way that NYLS could absorb that loss. In November 1997, NYLS faculty therefore voted to suspend the application of the non-discrimination policy to the military, which started on-campus interviewing. In January 2000, after federal student financial aid was removed from the scope of the Solomon Amendment, the faculty voted to resume full enforcement of the non-discrimination policy and exclude the military from on-campus recruiting.

19. After September 11, 2001, the military intensified its efforts to recruit on law school campuses, relying again on the threat of the Solomon Amendment. In December 2001, the Department of the Army informed me by letter that "military recruiting personnel have been inappropriately limited in their ability to recruit or have been refused student recruiting information at" NYLS. A true and correct copy of this letter is attached as Exhibit 7.

20. After a response from NYLS' Office of Career Services, the Department of the Army again wrote me in May 2002 to tell me: "Based on your letter and reports from our field screening officers, we believe that your institution is not complying with federal law and regulations with respect to access to your law school for military recruiting." True and correct copies of NYLS' Office of Career Services' response and the Army's May 2002 letter are attached as Exhibits 8 and 9. The Army advised:

> In particular, the following information indicates that your institution is not in compliance with federal requirements:
>
> a. New York Law School has an institutionalized policy that limits military recruiting.
>
> b. New York Law School does not allow military recruiters to recruit on its campus and does not provide military recruiters access to the services provided by the Office of Career Services.

Exhibit 9. The Army threatened:

> Unless we receive new information from you . . . showing that policies and practices of your institution have been modified to conform with federal requirements, or that the above information about your school is incorrect, we will consider forwarding this matter to the Office of the Secretary of Defense with a recommendation of funding denial.
>
> I regret that this action may have to be taken; however, as provided in federal law it is imperative that the Department of Defense recruiters have reasonable access to your law school campus.

Exhibit 9.

21. In the post-September 11 era, the Solomon Amendment's "scarlet letter"—publication of the names of non-compliant schools in the Federal Register —was too great a stigma. NYLS' longstanding commitment to expressing and living out its core principle of non-discrimination through the consistent and principled application of its non-discrimination policy crumpled. Even the resolve—tested by the events of September 11—to stand up for cherished beliefs, to express principled dissent, and to protect fundamental human rights gave way.

22. In September 2002, NYLS' Assistant Dean for Career Planning wrote the Army:

> Since 1983, New York Law School has included sexual orientation as a prohibited basis for discrimination. The School welcomed in 1990 the Association of American Law Schools' expansion of its non-discrimination policy to protect sexual minorities. As Americans, we are disheartened that our military, which is entrusted with the defense of the country, follows a policy that explicitly discriminates against gay and lesbian service members because it is demeaning, begets violence, and diminishes the strength of our armed forces.
>
> New York Law School's policy and that of the AALS, was never intended to be anti-military. It was intended to be anti-discriminatory. The New York Law School faculty have consented to suspend the application of our Career Services policy to allow military recruitment of our students at this time.

A true and correct copy of the Assistant Dean's letter is attached as Exhibit 10.

23. In October 2002, recruiters from the United States armed services were allowed on the NYLS campus to interview students and make presentations regarding employment with their Judge Advocate General's offices.

24. In advance of that occasion, I again addressed the concerns of the Law School community, attempting to reassure the community: "This decision in no way reflects a weakening of commitment to principles of non-discrimination. I personally believe that the military's discriminatory policies are demeaning, promote violence and diminish the strength of the armed forces, and I know that many members of the New York Law School community share that view." Exhibit 6.

25. I continued, reaffirming the critical importance of inculcating NYLS students with the "core principle of non-discrimination."

> Every lawyer must realize that invidious discrimination within the profession weakens the institution that is charged with preserving government of, for and by the people. While many legal educators have worked and continue to work to change the policy mandated by Congress, the need for and importance of an inclusive legal profession is independent of the current state of statutory law. New York Law School . . . reiterates in the strongest terms that discrimination on any of the grounds set forth in its non-discrimination policy is a disservice to the profession and to the rule of law.

> *The School reminds every member of the community, irrespective of political or ideological views, that the core principle of non-discrimination in legal employment is at the heart of the task of educating the next generation of American lawyers.*

Exhibit 6 (emphasis supplied).

26. NYLS' suspension of its non-discrimination policy as it applies to the military continues to this day, causing a constant ongoing harm. For example, my students have expressed to me the pain and dismay they feel when they see an employer that devalues them or their fellow students force its way onto campus. Another student, a commissioned infantry officer in the New York Army National Guard, wrote an op-ed piece published in the school newspaper to criticize what he perceived as NYLS' failure to adhere to principle: "Veterans would respect you more for sticking with your convictions (like the BLGLSA [the NYLS bisexual, gay and lesbian student group] has), rather than to 'pussyfoot' around controversies your convictions would raise . . . ." A true and correct copy of this op-ed is attached as Exhibit 11.

27. These harms to the Law School community and others resulting from the Solomon Amendment will only be alleviated if the Law School can set its policies based on its institutional values rather than in response to outside coercion.

* * * * *

EXCERPT OF EXHIBIT 9 TO MATASAR DECLARATION

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1777 NORTH KENT STREET
ROSSLYN, VIRGINIA 22209-2194

May 29, 2002

Reply to Attention of

Personnel, Plans, and Training Office

Richard A. Matasar
President, New York Law School
57 Worth Street
New York, New York 10013-2960

Dear Mr. Matasar:

This replies to Ms. Lori Freudenberger's letter dated January 8, 2002, which responded to our earlier request that you clarify your institution's policy regarding military recruiting on your law school campus. Based on your letter and reports from our field screening officers, we believe that your institution is not complying with federal law and regulations with respect to access to your law school for military recruiting. In particular, the following information indicates that your institution is not in compliance with the federal requirements:

a. New York Law School has an institutionalized policy that limits military recruiting.

b. New York Law School does not allow military recruiters to recruit on its campus and does not

provide military recruiters access to the services provided by the Office of Career Services.

* * * Unless we receive new information from you by July 1, 2002, showing that policies and practices of your institution have been modified to conform with federal requirements, or that the above information about your school is incorrect, we will consider forwarding this matter to the Office of the Secretary of Defense with a recommendation of funding denial.

I regret that this action may have to be taken; however, as provided in federal law it is imperative that Department of Defense recruiters have reasonable access to your law school campus.

* * * * *

Sincerely,

/s/ CLYDE J. TATE II
CLYDE J. TATE II
Colonel, U.S. Army
Chief, Personnel, Plans,
and Training Office

EXCERPT OF EXHIBIT 10 TO MATASAR DECLARATION

Margaret E. Reuter
Assistant Dean for Career Planning
57 Worth Street, New York, NY 10013-2960
T 212-431-2345 F 212-274-1491
mreuter@nyls.edu
www.nyls.edu

September 30, 2002

Colonel Michelle Miller
United States Army
Office of the Judge Advocate General
1777 North Kent Street
Rosslyn, VA 22209-2194

Dear Colonel Miller:

* * * I am writing to notify the Army of the availability of our Career Services Office to facilitate recruitment of our students.

New York Law School has long required employers wishing to use our career services facilities to abide by our non-discrimination policy. That policy states:

> New York Law School is committed to a policy which prohibits discrimination in employment based on sex, sexual orientation, marital or parental status, race, color, religion, ethnic or national origin, age or handicap. The Office of Career Services facilities are available only to employers whose practices are consistent with this policy.

Since 1983, New York Law School has included sexual orientation as a prohibited basis for discrimination. The School welcomed, in 1990, the Association of

American Law Schools' expansion of its non-discrimination policy to protect sexual minorities. As Americans, we are disheartened that our military, which is entrusted with the defense of our country, follows a policy that explicitly discriminates against gay and lesbian service members because it is demeaning, begets violence, and diminishes the strength of our armed forces.

New York Law School's policy and that of the AALS, was never intended to be anti-military. It was intended to be anti-discriminatory. The New York Law School faculty have consented to suspend the application of our Career Services policy to allow military recruitment of our students at this time. New York Law School continues to be disturbed by the military's employment practices and will use other means to voice our criticisms.

Sincerely,

/s/ MARGARET E. REUTER
MARGARET E. REUTER
Assistant Dean for Career Planning

cc: Dean Richard Matasar
Lieutenant Colonel Chris DeToro

EXCERPT OF MAY DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ____

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, ET AL., DEFENDANTS

DECLARATION OF GERALD MAY

I, Gerald V. May, III, declare pursuant to 28 U.S.C. § 1746, as follows:

1. I am currently a student at Boston College Law School ("BC Law" or "the Law School"). If called as a witness, I could and would testify to the following based on personal knowledge or, if indicated, based on information and belief.

2. As a new law school student, I approached the start of my BC Law career with a sense of excitement and optimism. Coming from a liberal arts college with a commitment to diversity, I looked forward to working in another open environment where I could interact with and learn from people with different backgrounds and perspectives. Because of its strong emphasis on tolerance, inclusiveness, and respect for the dignity of each individual, BC Law seemed like a natural place to

continue my education. As the initial weeks of law school passed and I got to know the other students in my section, I saw these institutional themes take on a human dimension. Between classes and during study sessions, I developed strong friendships with several of my section mates. They were bright, articulate, funny, and always willing to be lunch companion or offer their notes when I missed a class. As I found out later in the year, some of my best friends were also gay. Talking with them about their families, partners, interests, and accomplishments, I gained a deep appreciation for the courage with which they faced societal perception about their sexual orientation, and the encouraging example they set for others who were apprehensive about identifying themselves as gay or lesbian. With these strong relationships in place, I felt that BC Law was exactly the extension of my college experience which I had hoped it would be.

3. When I returned to begin my second year in Fall 2002, I encountered an institution which was disturbingly different from the one I had so eagerly joined a year before. Under pressure from the Air Force and its invocation of the Solomon Amendment, the faculty had voted to suspend the sexual orientation portion of the law school's nondiscrimination policy and treat the military as just another employer with complete access to the Career Services Center. With this full acquiescence to the military's demands, the inclusive environment which had shaped my first year vanished. Literally overnight, I lost the open and diverse atmosphere which had enriched me intellectually and emotionally, and the tolerant campus which had fostered my friendships with gay and lesbian students in my section. Sitting around the school cafeteria after learning of the

faculty decision, my friends and I struggled to comprehend how the Law School could be forced to abandon one of its defining features, and how we would carry on now that the values which had so attracted us to the school had been compromised by the threat of millions in lost federal funds.

4. Soon after the suspension, military recruiters arrived at the Law School, and I had to directly confront the presence of discrimination on campus. Watching JAG recruiters casually walk down the hallways and sip free coffee provided by the Career Services Center gave me a sickening feeling, as if it were perfectly normal for an employer who so openly practices bigotry to be welcomed like any other firm. It was as if our nondiscrimination policy and commitment to inclusiveness had never existed, and the notices posted by interview rooms elaborating on the circumstances of the military's unfettered recruiting provided little comfort. No amount of explanation or justification changed the fact that I had lost something vital to my law school experience, and that the decision to suspend the nondiscrimination policy would cloud the rest of my time in law school.

5. As difficult as it was for me to personally deal with the abrupt end to the school's inclusive atmosphere, it was even more difficult to watch the impact which the nondiscrimination policy's suspension had on my gay and lesbian friends. The vibrant involvement in class discussions and the energetic dialogue outside of class diminished, replaced by anxiety over the destruction of the institutional guarantee that they had lived and worked under during their first year. I watched my friends struggle to digest the fact that they were shut out of employment opportunities available to

heterosexual students, and that they now had to search for jobs in a Career Services Center that featured an employer that would never hire them no matter how bright, talented, or dedicated they were. More profoundly, I watched them confront the realization that they were now relegated to the role of second class citizens, and saw the pain caused by this assault on their personal dignity and sense of self worth.

6. For the remainder of my time as the President of the Coalition for Equality, and as a member of the bar after that, I will continue to oppose the Solomon Amendment and its poisonous effects on BC Law. This law has forced BC Law to abandon the open and inclusive environment which was such an important part of my own educational experience, intellectual growth, and emotional development. The Solomon Amendment has also seriously hurt gay and lesbian students, students who have made an array of positive contributions to the Law School and students whose insights and empathy have made me a better student and person. My straight friends, my gay friends, and I deserve the benefit of the tolerant campus which BC Law embraced when the faculty voted to add sexual orientation to the school's nondiscrimination policy in 1982. Anything less will be a triumph for government coercion and a betrayal of the promise that all of us relied on when we matriculated.

I declare under penalty of perjury that the foregoing is true and correct.

* * * * *

EXCERPT OF MINUSKIN DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ____

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, ET AL., DEFENDANTS

DECLARATION OF ALAN MINUSKIN

I, Alan D. Minuskin, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am an Associate Clinical Professor of Law at Boston College Law School ("BC Law" or "the Law School"). I have been on the BC Law faculty since 1990. My primary teaching responsibility is in the law school's Civil Litigation Clinic. I also teach Introduction to Lawyering and Professional Responsibility, a required first-year ethics course. I currently serve as Director of the Boston College Legal Assistance Bureau, a legal services office funded by the law school and staffed by faculty and students dedicated to promoting social justice by providing free legal advice and representation in civil matters to clients living below the poverty line. Since 1998 I have served as Chair of the Law School's Task Force on Military Recruiting Policy (further described below). If called as a witness,

I could and would testify to the following based on personal knowledge, or if indicated, on information and belief. In doing so I speak only for myself and not on behalf of any other person, institution or entity.

Principles of Equality and Non-discrimination at BC Law

2. BC Law is part of Boston College ("BC" or "the University), a university founded in the Jesuit tradition. Although BC's undergraduate departments, graduate school, and BC Law are all part of the same university, BC Law has its own policy against discrimination (the "Non-discrimination Policy" or the "Policy").

3. The BC Law faculty voted in 1982 to amend the school's Non-discrimination Policy to add "sexual orientation" as a basis on which discrimination would be barred. The Policy now provides as follows:

> Boston College Law School is committed to a policy against discrimination and harassment based on age; sex; race; color; religion; national origin or ancestry; sexual orientation; disability; or marital, family or military status. Boston College Law School extends use of its facilities to employers whose policies are consistent with this policy and expects that no discrimination or harassment will occur in hiring, promotion, compensation, and work assignments.

A true and correct copy of the Non-discrimination Policy is attached at Exhibit 1.

4. I view the Law School's Non-discrimination Policy as an important part of the law school's educational policy because an environment sufficiently conducive to teaching and learning is not possible if harm-

ful, irrational discrimination is supported or condoned by the school. Since I began chairing the Law School's Task Force on Military Recruiting in 1998, I have had hundreds of conversations with BC Law students about the law school's commitment to non-discrimination on the basis of sexual orientation. I have learned in conversations with gay, lesbian, and bisexual students that many chose to come to BC Law because of its long-standing commitment to diversity, including its intolerance of discrimination on the basis of sexual orientation. When BC Law made an exception for an openly discriminatory employer, students told me that they felt betrayed. They explained that the only message they could derive from abandonment of the Non-discrimination Policy was that the Law School was not really as serious about its commitments as promised. For many students this meant that they lost confidence in the sincerity of BC Law's commitment to diversity and its pledge of welcome and full citizenship in the community regardless of sexual orientation. They expressed profound disappointment and disillusionment at the notion that their school would cooperate with the suppression of their opportunity to express themselves fully and to avail themselves of all the rights and privileges afforded to their straight peers. They expressed concern that the instant elimination of one promised protection could mean that other promises and representations were not reliable.

5. I also learned from hundreds of conversations with straight BC Law students that they came to BC Law in part because of its commitment to diversity, including its pledge of welcome and full citizenship in the community regardless of sexual orientation. They too have expressed profound concern and confusion

about the sudden, blatant elimination of a protection that had been promised. They too worried that the institution's elimination of one promised protection made other commitments by the institution questionable.

6. Most concerned students with whom I spoke interpreted the Law School's policy shift to mean that one could not really trust basic assumptions about the acceptability of their own expressions within the community. They were, therefore, less likely to speak their minds. Instead of feeling the safety promised by the commitment to acceptance, diversity, and the prohibition of sexual orientation discrimination, they felt the danger of the instability of those guarantees.

7. For the same reasons I also view the act of weakening or impairing the Non-discrimination Policy to be a significant interference with the quality of the Law School's educational environment for many, if not most, students, staff, and faculty of the Law School.

8. Upon my information and belief, when BC Law was founded in 1929, its first dean, Dennis Dooley, envisioned a law school with a social conscience as well as an analytical mind. We have held fast to this vision. As BC Law's promotional materials explain, "While we have always placed a great deal of emphasis on the practical professional skills which every good lawyer must possess, those skills are imparted within a framework of ideals—ideals such as justice and public service —that have made the study and practice of law a calling for so many who come here." This framework makes for an environment in which students "are at once highly credentialed and highly collegial in their relationships with each other and with the faculty. That sense of community springs from a shared respect for

the law as the cornerstone of a democratic society, and for one another as legal scholars." A true and correct copy of the promotional materials is attached at Exhibit 2. At an institution where law and social justice are studied, an environment sensitive to the impropriety of irrational, harmful discrimination is essential. Any other sort of environment would be inconsistent with the fundamental principles of the education and professional orientation that the law school promises. The Non-discrimination Policy is thus an important part of BC Law's educational philosophy.

9. I chose to join the BC Law faculty in large part because of the school's historic and conspicuous commitment to social justice, including its prohibition of discrimination on the basis of sexual orientation.

BC Law's Non-discrimination Policy and Military Recruiting

10. Upon my information and belief, in implementing its Non-discrimination Policy, the Career Services Office of BC Law requires employers who wish to visit the law school campus to conduct interviews of BC Law students to sign the following statement:

> The undersigned employer hereby affirms that it is an equal opportunity employer and does not discriminate in any form based on age, sex, race, color, religion, national origin or ancestry, sexual orientation, disability or marital, family or military status. By using the services of Boston College Law School Office of Career Services, the undersigned employer agrees to abide by the above policy.

A true and correct copy of this statement is attached at Exhibit 3.

11. Upon my information and belief, because of the military's explicit policy of discrimination on the basis of sexual orientation, recruiters for branches of the United States military have never been able to certify that their offices do not discriminate on the basis of sexual orientation.

12. Upon my information and belief, because of the military's explicit policy of discrimination on the basis of sexual orientation, recruiters for branches of the United States military were prohibited from recruiting on the Law School campus from 1982 until 1998. Law students who wished to interview with military recruiters could do so, but interviews were scheduled to take place on the main campus of the University located 1.58 miles from the law school campus.

13. In 1990, the Association of American Law Schools required its members to insist that employers who seek to use a law school's career services facilities provide written assurance that they will not discriminate based upon sexual orientation or any other protected category. This requirement was not an issue for BC Law because it already adopted this policy eight years earlier.

14. After enactment of the first version of the Solomon Amendment in 1995, BC Law did not alter its policies or procedures. The law threatened suspension only of Department of Defense funding, but, upon my information and belief, the Law School did not, and does not, receive grants or appropriations from the Department of Defense.

15. Furthermore, language implementing the Solomon Amendment specified that Department of Defense funding could be withheld only from those parts ("sub-

elements") of an institution of higher education that denied access to military recruiters. The University's Department of Defense funding was not at risk. BC Law, therefore, continued not to permit military recruiters to conduct interviews using the facilities of the Law School's Career Services Office. Upon my information and belief, military recruitment of BC Law students continued to occur at the main campus of the University as described above.

16. In 1997, Congress expanded the Solomon Amendment to permit the suspension of a wider range of federal funding to schools that denied recruiters access. The wider range of federal funds included student financial assistance.

17. In March 1998, BC Law received a formal notice from the Department of Defense that the law school's eligibility for federal funds was in jeopardy as a result of BC Law's application of its Non-discrimination Policy to the military.

18. In September 1998, BC Law supplemented its Non-discrimination Policy with a "Discrimination Notice" that said:

> It is the policy of the Law School not to extend the use of its facilities to any organization that discriminates, even legally, on the basis of sexual orientation. We feel very strongly about this policy and make substantial efforts to assure that no student or student group is subjected to such discrimination. The Armed Forces, of which the Judge Advocate General's Corps (JAG) is a part, has had a long history of discriminatory practices against gays, lesbians, and bisexuals. However, under a recent federal law (the Solomon Amendment), the federal

> government may withhold federal funds from schools that do not allow military recruitment on-campus. Therefore, in response to a threat of the loss of federal funds, such as federal work-study and Perkins loans, which would be extremely harmful to students, Boston College Law School reluctantly permits the Judge Advocate General's Corps recruiters on-campus to conduct campus interviews. Boston College Law School opposes policies of discrimination on the basis of sexual orientation. The Law School will engage in appropriate activities to ameliorate any negative effects that granting access to the military may have on the quality of the learning environment for its students, particularly its gay, lesbian and bisexual students.

A true and correct copy of this notice is attached at Exhibit 4.

19. The BC Law faculty took the above action only because it understood that the Solomon Amendment would otherwise have allowed the government to cut off its law students' financial aid. BC Law did not wish to change its stance and would not have otherwise done so.

20. On October 7, 1998, then-Interim Dean James Rogers held an open forum on the Solomon issue, which he urged all students and other members of the Law School community to attend. The forum was held in the Law School's largest classroom. All classes regularly held at that time were cancelled to permit and encourage attendance.

21. In October 1998, Dean Rogers formed a Task Force on Military Recruiting Policy. Among other things, Dean Rogers instructed the Task Force to

consider and make recommendations on the various specific ways that we might attempt to structure JAG recruiting visits in a fashion that would comply with the Solomon Amendment but minimize the harm to the community. Dean Rogers appointed me to serve as chair of the Task Force.

22. In April 1999, upon a recommendation of the Task Force, the BC Law faculty adopted a policy of minimal compliance with the Solomon Amendment. The law school resolved to weaken its Non-discrimination Policy only to the extent necessary to prevent interruption of student financial assistance. In doing so the BC Law faculty declared, in part, that "the Faculty of Boston College Law School believe that the quality of the learning environment for our students is impaired by the use of Law School facilities for purposes of recruiting by any employer that does not adhere to our non-discrimination policy . . ."

23. While the Law School did not deny military recruiters access to campus or to students for purposes of military recruiting, such entry and access was to be provided only to the extent specifically required by the Solomon Amendment, and the Law School would not otherwise facilitate or assist the military in recruiting.

24. In April 1999, upon a recommendation of the Task Force, BC Law added the following language to its non-discrimination notice describing the newly adopted procedure for accommodating military recruiters.

> **Implementation Procedure for Military Recruitment**: Boston College Law School will not deny military recruiters entry to the campus or access to students for purposes of military recruiting. Such

> entry and access will be provided only to the extent specifically required by the Solomon Amendment, and the Law School will not otherwise facilitate or assist the military in recruiting. Information from military recruiters, including notices of the date and place of military recruiting visits and the address or other contact information for the military recruiter, will be available in a file kept at the Reserve Desk of the Law School Library. Students interested in meeting with military recruiters should review this information in order to contact military recruiters directly to schedule an interview time.

A true and correct copy of this language is attached at Exhibit 5.

25. What this meant in practice was that information from military recruiters would be kept for student use in the library but not in the Career Services Office. Students interested in interviewing with military recruiters contacted recruiters directly, and on-campus interview times and locations were facilitated by sign-up sheets through the Associate Dean's Office rather than the Career Services Office.

26. The above procedure remained in effect until September, 2002.

27. In the latter part of 1999 Congress exempted student financial assistance funds from the punitive reach of the Solomon Amendment. A school found to have prohibited or prevented military recruiters' access could no longer be sanctioned by the suspension or withdrawal of federal student financial assistance funds.

28. In January 2000 the Department of Defense announced a change in its regulations, one that ex-

panded the punitive reach of the Solomon Amendment to include deprivation of federal funding to an entire university if a subelement (e.g. a law school) were determined to have unlawfully inhibited on-campus military recruiting. This meant that an institutional subelement's (e.g. a law school) interference with recruiters' access could result in the loss of federal grants and contract funding to any and all other parts of the university.

29. In December 2001, Colonel Daniel B. Fincher of the US Air Force began a new volley of correspondence with BC consisting of written inquiries and replies about BC Law's procedures for facilitating military recruitment on the Law School campus.

30. Colonel Fincher's initial inquiry asserted, in my view mistakenly, that accommodating military recruiters in any way that was less than equal to the accommodations afforded non-discriminatory employers, amounted to a violation of federal law. The letter stated that Department of Defense officials would use BC's response to make a determination as to BC's eligibility to receive grants and contracts from specific federal agencies. The letter relied on 32 CFR part 216, 10 USC § 983, § 8120 of the DOD Appropriations Act of 2000, and referred to a loss of eligibility to receive appropriations from the Department of Defense, Labor, Transportation, Heath and Human Services, Education, and related agencies.

31. Through the General Counsel of Boston College, BC Law explained in a January 2002 written reply that the military was not "denied access" to students or to the BC Law campus. The letter expressed precisely how the procedure was tailored to meet the requirements of the Solomon Amendment.

32. Colonel Fincher did not respond until May 29, 2002, when he wrote that representatives of the US Air Force continued to view BC Law to be out of compliance with federal requirements because: (a) BC Law did not grant equal access to their students, and (b) BC did not grant access to the Career Services Office, but provided a more limited access to students through an associate dean. The letter threatened that if full access to students and the Career Services Office was not granted by July 1, 2002, the Air Force would "forward the matter to the Office of the Secretary of Defense with a recommendation of funding denial." Other than making a claim that equal access was required, Colonel Fincher did not respond to the substance of BC's claims or arguments.

33. Through its General Counsel, BC responded to Colonel Fincher on June 24, 2002, asking for an extension until the end of September, when, because of the academic calendar, the proper faculty vote could be taken. With no written response, BC General Counsel wrote again on July 17 asking for the same. An extension was granted orally, postponing the deadline until September 15.

34. Upon my information and belief, among the University funding put at risk by the DOD's interpretation of the Solomon Amendment and its own regulations was approximately five million dollars from the DOD and its components, most which ($4.3 million) came from the Air Force to the Institute for Scientific Research (a subelement of the University).

35. In late August and early September, the BC Law faculty learned about the above correspondence from the Air Force and the quickly approaching September 15 deadline. Because of the short time available,

no one on the faculty performed a thorough legal analysis of the regulations or the Department of Defense's application of them, and the faculty did not otherwise have the benefit of any such legal analysis. On September 9, a majority of the BC Law faculty, believing it had no choice but to grant full and equal access to the military or risk losing millions of dollars of university funding without any further process, voted to suspend the Non-discrimination Policy vis-à-vis military recruiters and to grant the military access to the facilities of the Career Services Office.

36. On September 15, 2002, the Lambda Law Students Association of BC Law wrote an open letter to the faculty and administrators of BC Law, protesting the decision to abandon the law school's policy with respect to the military. They stated:

> Law schools boast about the prestigious employment their graduates obtain in order to entice new law students. In this way, the Career Services Office is the heart of our campus. To allow into the Career Services Office, without protest, an employer that blatantly discriminates against *any* student is to functionally nullify our non-discrimination policy.

A true and correct copy of this letter is attached at Exhibit 6.

37. Also in the Fall 2002 semester open letters to the faculty and/or Law School community were written by BC Law's Black Law Students Association, International Law Society, Women's Law Center, and Domestic Violence Advocacy Project expressing support for the law school's Non-discrimination Policy without

exception. True and correct copies of those letters are attached as Exhibits 7-10.

38. On October 25, 2002 another group of BC Law students known as the Coalition for Equality at Boston College Law School wrote an open letter to the BC Law community. That letter was endorsed by the following BC Law student organizations: American Constitution Society Executive Board; Asian Pacific American Law Students Association; Holocaust/Human Rights Project; International Law Society; Jewish Law Students Association; Lambda Law Students Association; National Lawyers Guild; Public Interest Law Foundation Civil Rights Project; Reproductive Choice Coalition; and Women's Law Center. A true and correct copy of that letter is attached as Exhibit 11.

39. On October 3, 2002, BC Law's Career Services hosted the Air Force and the Army Judge Advocate General Corps. Soon thereafter, Navy and Marine JAGs visited BC Law to conduct on-campus recruiting. More military recruiters conducted on-campus interviews in the spring semester of 2003. All branches were treated exactly the same as other employers.

40. During the 2002-03 academic year, faculty and students protested multiple times against the presence of military recruiters on the BC Law School campus.

41. Upon my information and belief, recruiters for at least two branches of the US military are scheduled to conduct on-campus recruiting at BC Law with full access to the services provided by the Career Services Office in the early Fall of 2003.

42. Upon my information and belief, military recruiters on the BC Law campus this Fall will refuse to sign

the non-discrimination affirmation of the Career Services Office.

43. Upon my information and belief, military recruiters who interview openly gay, lesbian or bisexual candidates will, without regard to their qualifications to become excellent military attorneys, automatically refuse to pursue those candidates for employment.

44. Upon my information and belief, BC Law's abandonment in this instance of its decades-old stance against discrimination on the basis of sexual orientation, has destroyed, and will continue to destroy, students' confidence that an institutional pledge of non-discrimination will be honored.

45. I declare under penalty of perjury that the foregoing is true and correct.

* * * * *

NEUBORNE DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ___

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, DEFENDANTS

DECLARATION OF BURT NEUBORNE

I, Burt Neuborne, a lawyer admitted to practice before the Courts of the State of the New York, and the United States Supreme Court, hereby declares pursuant to 28 U.S.C. § 1746 and under penalty of perjury as follows:

1. I am the John Norton Pomeroy Professor of Law and Legal Director of the Brennan Center for Justice at New York University School of Law ("NYU Law" or the "Law School"), where, since 1974, I have taught Constitutional Law, Civil Procedure, Evidence, and Federal Courts. In 1990, I received New York University's Distinguished Teaching Medal. I make this declaration in support of plaintiffs' application for preliminary injunctive relief against a recently enunciated construction of the so-called Solomon Amendment that threatens American universities with massive across-

the-board cuts in federal funding unless law schools affiliated with such universities violate long-standing anti-discrimination policies forbidding institutional cooperation by law school placement officials with prospective employers who discriminate in hiring on the basis of race, religion, gender, national origin, or sexual orientation.

2. I believe that the current effort by the government to condition across-the-board federal funding of American universities on a coerced surrender of law school policies forbidding cooperation with prospective employers, including government employers, who discriminate in hiring, violates the First Amendment rights of law students, faculty and the law schools themselves. Where, as here, members of a law school academic community have joined together in refusing to provide institutional assistance to prospective employers who discriminate in hiring, government may not condition wholly unrelated financial assistance to the university at large on a law school's waiver of the application of the anti-discrimination policy in connection with the military's decision to discriminate in hiring on the basis of sexual orientation. Indeed, where, as here, a private academic community has exercised important First Amendment rights in order to speak and associate against discriminatory behavior, the Supreme Court has repeatedly ruled that government may not use the power of the purse to penalize the academic community for exercising its First Amendment rights, any more than it may use direct coercion. *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); FCC *v. League of*

Women Voters, 468 U.S. 364 (1984); *Speiser v. Randall*, 357 U.S. 513 (1958).

3. I make this declaration, however, not to discuss the legal authorities, but to describe to the Court why legal academic communities feel so deeply about a policy of denying institutional cooperation to employers who discriminate in hiring, and what the costs are to the academic community of government-coerced abandonment of any segment of the law school community to discrimination in hiring.

4. Historically, law schools have adopted anti-discrimination policies in connection with hiring as part of the painful process of eliminating irrational prejudice from the legal profession. In the beginning, the legal profession was white, male and Christian. Horrendous stories of the difficulties faced by Jews in gaining legal employment are legion, symbolized by the early struggles of Louis Brandeis and Felix Frankfurter. The century-long effort of women to find an equal place in the legal profession is symbolized by the early struggles of Sandra Day O'Connor and Ruth Bader Ginsburg. The continuing dramatic under-representation of people of color at all stages of the legal process remains one of the most troubling aspects of American law.

5. American law schools have reacted to the systemic exclusion of qualified persons from the profession by promising their students that the resources of the law schools would never be used to perpetuate such a deviation from the norms of equality and respect for the dignity of the individual that are taught inside their classrooms. Accordingly, for decades, legal employers have been told in no uncertain terms that law schools will not cooperate with them in finding new employees

unless the hiring process is an exercise in individual merit, not an excuse for racial, religious or gender discrimination. Three enormously important benefits have flowed from the adoption of such anti-discrimination policies.

First, the policies have placed modest pressures on employers to re-think the stereotypical notions that underlie prejudice and discrimination. Such modest pressures should not be overstated. Employers wishing to discriminate were—and are—fully able to contact interested students without the cooperation of the law schools; but the inconvenience and public scrutiny involved in such a process may well cause some would-be discriminators to have second thoughts.

Second, the policies were—and remain—crucial in providing law students belonging to groups that are the targets of irrational prejudice with a sense of reassurance and institutional support that is absolutely essential in any setting in which a student girds to fight prejudice in the outside world. The study of law is an anxiety-generating enterprise. Students from the most privileged backgrounds often find law school a significant challenge, even when the only thing they must worry about is their own ability and ambition. Law students drawn from groups facing on-going prejudice in the outside legal community must also deal with issues of personal ability; but, as well, they grapple with the knowledge that they must overcome headwinds of prejudice in order to forge a successful legal career. Such an additional layer of anxiety understandably complicates the law school experiences of many students. Law schools should respond with understanding. Many do. Among the most important aspects of support that a law school can extend to a young person

facing the prospect of prejudice is to distance itself institutionally in the strongest possible terms from any manifestation of prejudice. Only when a law student feels secure and valued as an equal in his or her own academic community can that student attain full academic potential. Anti-discrimination hiring policies have functioned as tangible evidence that American law schools welcome their diverse student bodies, and stand squarely behind every student in their hopes for a career based on merit. The academic value of such institutional reassurance to vulnerable students is incalculable.

Third, the policies provide crucial evidence to all students that the principles of equality before the law, protection of individual dignity, and respect for individual merit that are the bedrock of an American law school curriculum are worth living by; not merely worth preaching about. Law students can be a cynical lot. Adherence to principle is the gold standard by which they test the system, and the world around them. All too often, faced with a world in which reality falls far short of the ideal, law students retreat into a cynical shell, making it extremely difficult to conduct serious inquiry into issues of legal principle. It becomes difficult in those settings to ask students to distinguish between law and raw power. When, however, their law school stands up for principle, the act sends a message that it is possible to live by the ideals that we preach. Such a concrete manifestation of principled behavior encourages an intellectual environment in which all sides of a legal issue—including the wisdom and correctness of anti-discrimination hiring policies—can be raised and discussed vigorously in the classroom as if

they really mattered, because students can see that people act on principle, not merely talk about it.

6. During my teaching career at NYU Law School, I have observed the benefits of the anti-discrimination hiring policy in action. I have seen employers change their hiring patterns, in part because the policy encouraged re-thinking old ways. I have seen student members of groups facing prejudice draw solace from the support of their school and their fellow students. And, I have been privileged to participate in classroom discussion of fundamental principles with students who care deeply about principle, in part because their school was seen to take principle seriously, as well.

7. In 1978, when it became clear that discrimination on the basis of sexual orientation was impeding the ability of qualified law students to forge a legal career based on merit, I supported the expansion of NYU Law's anti-discrimination policy to preclude cooperation with employers who acted as though sexual orientation mattered in the practice of law. Over the years, since the expansion of the anti-discrimination hiring policy, I have observed employers re-think their sexual orientation hiring policies; gay and lesbian students draw support from the solidarity expressed by their school; and the greater law school community grapple both in and out of the classroom with difficult legal issues raised by sexual orientation in a climate in which adherence to principle was seen to matter.

8. I was, therefore, deeply saddened in 2000 when, under the unconstitutional threat of a university-wide loss of federal funding, NYU Law was forced to violate its deeply held principles by cooperating with an employer—the military—that had publicly announced an intention of discriminating in hiring on the basis of

sexual orientation. I was doubly saddened because, in my view, serving the nation as a military lawyer is a highly commendable form of public service. It was—and is—my belief that it is a tragic mistake to deny a law student an opportunity to serve this country as a military lawyer solely because of the student's sexual orientation. I understood, however, that the risk to the university as a whole of the loss of all federal funding, including federal funding to the medical school which serves poor communities in New York, and the loss of funding to other aspects of NYU that have historically offered the poor the first step on the road to the American dream, placed administrators in an impossible position. Indeed, it is precisely because I believe that the First Amendment precludes the government from confronting university administrators with such a Hobson's choice that I support this litigation.

9. My concern was not merely abstract. I was involved in teaching a year-long course in Constitutional Law when the pressures on the university forced the law school to abandon its principles and to give public aid and comfort to an employer that had sworn in advance not to hire members of the law school community for reasons having nothing to do with merit, and everything to do with irrational prejudice. I sought to discuss the issue in class, but was met with silence and a sense of abandonment by gay and lesbian students in my class. Students who had enrolled at NYU Law School because they felt supported and fully accepted believed that they were being sacrificed because the potential cost to the university of losing federal funds outweighed the value of principle. As one student said to me at the end of class: "What's the price tag on my

equal rights? Why should I believe you when you talk about principle?"

10. The impact on all students in the course was palpable. A world-weariness seemed to envelop the discussion, and the mere mention of the word "principle" lead to snickers. I do not believe that it is possible to discuss the profound issues of equality, individuality and institutional structure that form the basis of a Constitutional Law course effectively in an atmosphere where students believe that their law school has been forced by their government to abandon its commitment to equality in hiring because the government has made it too expensive to live up to principle. In the end, although the students displayed their usual mastery of the doctrinal material, I do not believe that the class was a success.

I have no quarrel with the administrators who were forced to abandon the principle of non-cooperation with employers who discriminate. They were placed in an impossible situation by an interpretation of the Solomon Amendment that threatened the very survival of the university as the cost of adherence to principle. Where, however, an academic community has agreed to act in accordance with principle, both because it is the right thing to do and because the health of the academic enterprise is aided by the decision, I do not believe that the First Amendment allows the government to place inexorable financial pressure on the academic community to abandon its principles as the price of continuing to receive wholly unrelated government financial support. This year, the government is using the threat of university-wide funding cut-offs to blackmail law

schools into compromising their anti-discrimination policies. If government is successful, how long will it be until similar threats are used to force the abandonment of affirmative action programs?

Executed on September 18, 2003
in New York City, New York

/s/ BURT NEUBORNE
BURT NEUBORNE

EXCERPT OF ROGERS DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ___

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, ET AL., DEFENDANTS

DECLARATION OF JAMES S. ROGERS

I, James Steven Rogers, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am currently a Professor of Law at Boston College Law School ("BC Law" or "the Law School"). I have served BC Law in one capacity or another for over twenty years. In 1980, I joined the Law School faculty. In 1977, I became Associate Dean for Academic Affairs. Then, from 1998 to 1999, I served as the interim Dean of the Law School. I received my A.B. *summa cum laude* from the University of Pennsylvania in 1973, and a J.D. *magna cum laude* from Harvard Law School in 1976. I have taught commercial law, contracts, bankruptcy, corporations, restitution, and constitutional law, and am the author of various works on modern commercial law and bankruptcy, particularly in the field of negotiable instruments law and concepts, and several

articles and a book on the history of Anglo-American commercial law of bills and notes.

2. If called as a witness, I could and would testify to the following based on personal knowledge, or if indicated, on information and belief. My testimony reflects my personal views, formed while serving BC Law in the capacities described above. As I am no longer serving in any administrative role, I do not speak officially for Boston College Law School.

3. Nondiscrimination at BC Law is fundamentally a question of educational policy. The Law School, like many others, has long had a nondiscrimination policy (the "Nondiscrimination Policy" or "the Policy") pledging that we will not discriminate in our own activities, such as admissions, financial aid, operation of academic programs, awards and honors, or any other aspect of our academic and co-curricular programs, or in employment of faculty and staff, in hiring, promotion, compensation, or work assignments.

4. Since 1982, BC Law has included sexual orientation in our non-discrimination policy.

5. An important aspect of BC Law's non-discrimination policy is that we will not extend the services of our Career Services Office to employers whose policies are not consistent with our non-discrimination policy.

6. There is very good reason for this policy. As a professional school, our goal is not simply to educate, but to assist our students in becoming members of the profession. Our career services offices provide extensive information, physical facilities and logistical support to assist our students in obtaining employment, and, correlatively, to assist employers in reaching our

students to fill their staffing needs. Given our commitment to non-discrimination against gays and lesbians, we cannot in good conscience extend this extensive logistical support to employers who come to us saying "we seek your assistance in reaching your students, but we will not hire those of a particular race, gender, creed, or sexual orientation." To do so would be—and would be perceived by our community as—abetting the act of discrimination.

7, The reason for this policy also relates, perhaps even more importantly, to the effect that allowing recruitment on our campus by those who exclude gays and lesbians would have on our own educational program. I hardly need to explain to judges or lawyers who will read this declaration that a law school education is a stressful experience for law students. At one time there were, and there may still be, law schools that take positive delight in that fact, and profess to find educational value in inflicting psychic harm on their students.

8. But BC Law is not that sort of place. We seek to establish an environment in which our students are educationally challenged to the maximum, but do so in a supportive and caring community. The very heart of our mission and identity as a law school is that our students, and indeed, our entire community learns together. We often state that our goal is not only to train students who will be good lawyers, but students who will lead good lives.

9. Thus, as a matter of our own educational policy and philosophy, we firmly believe that we can educate students for careers of service to the profession only by providing an atmosphere at our law school that is hospitable to all of the members of our community. We

cannot tolerate any acts of harassment, abuse, or oppression against any member of our community, on grounds of sexual orientation or any other basis. We cannot succeed in our educational mission if some groups of our students feel that they too do not fully enjoy an atmosphere of mutual respect, in which their dignity is always upheld, and in which they feel free to express not only their intellectual views but also their personality and humanity, without fear or concern for discrimination, harassment, marginalization, or exclusion. Extending placement office services to any organization that excludes gay and lesbian students—or any other class—is fundamentally inconsistent with our educational policy.

10. As a law school, the strong orientation of our students and faculty is toward issues of legal and civil rights, so I think that it is appropriate for us to be especially guided by the consistency of our actions and policies with the principles of respect in civil society for the human dignity of all persons.

11. The Law School's position on the Solomon Amendment is not based on a notion that we should be able to tell the services how to run the military; rather it's based on the point that the military—and Congress —should not be telling us how to run a law school.

12. Nor is the Law School's policy on this issue or the exclusion of JAG recruiters an anti-military stance. As Pogo famously said "We have met the enemy and he is us." The source of the discrimination that gays face in the military—and the source of the harm inflicted on gay students by the Solomon Amendment is not the military; it's our elected leaders. The military services have shown that they can work to overcome ingrained prejudice—even in foxholes—against racial minorities

and (to some extent) women. If Congress acts to eliminate the discrimination against gays and lesbians in the military, I have no doubt that the services will act diligently to implement that policy. This is an important point because, as I noted above, our opposition to Solomon is based on our educational judgment that legal education requires an environment in which all of our students feel that they are fully respected members of our community. That's just as true for the many members of our student body who have or plan to pursue careers in the military. Our dispute is not with those who have served in the military, but with the US Congress and the executive that have persisted in denying that opportunity to others.

13. In the late spring of 1998, almost immediately upon the commencement of my term as interim dean, BC Law was one of a handful of schools to receive a formal notice from the Department of Defense (DOD) that our eligibility for federal funds was in jeopardy as a result of JAG's exclusion from on-campus recruiting.

14. As the legislation then stood, disqualification of the Law School from eligibility for federal funds would have had a serious impact on our students. The programs that would be at risk (work-study funding and Perkins loans) provided over $1.5 million annually to BC Law students. These are not programs that provide funding to the Law School itself for its own operation. Rather these are programs in which the Law School acts as intermediary for funding provided by the federal government to help students meet their heavy tuition bills.

15. In my view, this legislation was utterly pernicious. It sought to pit two groups of disadvantaged persons against each other: those with the greatest

need for access to federal educational loans, and those with the greatest need for protection against discrimination. By placing law school administrations in the position of having to choose between principle and fiscal need, it sought to commandeer the offices of private educational institutions and use us as the instruments for inflicting real harm on our students. A memo produced by the AALS Section on Gay and Lesbian Legal Issues (n/k/a the Section on Sexual Orientation and Gender Identity Issues, or SOGII) put it well: "This legislation is designed to force schools to select which among their students will be deemed expendable —those that need financial aid to secure a legal education or those that need antidiscrimination protection to secure their professional opportunities." A true and correct copy of this memo is attached at Exhibit 1.

16. The Law School and its faculty gave serious consideration to whether our institution and our students realistically could continue to function without access to federal educational funding and whether there was any realistic prospect of finding alternate sources of funding. Sadly, we concluded that the answer was no. Accordingly, the Law School Faculty voted, with great reluctance and concern, to create a limited amendment to our nondiscrimination policy pertaining to military recruitment that would permit JAG to conduct on-campus interviews.

17. The notice that we received from DOD, and the Faculty's reluctant decision to permit an exception to our Non-discrimination Policy happened in the late Spring, essentially after the close of the academic year. So it was not until the students returned in the Fall of the 1998-99 academic year that they became fully aware

of the issue when one of the military branches demanded an opportunity for on-campus recruiting.

18. When they did return, the students as a whole reacted with grave concern and indeed outrage. Our judgment at BC Law is that the environment in which we educate our students plays an essential role in our educational policy. The Solomon Amendment sought to force us to abandon the policies that we had judged were essential consequences of our own principles not only of social justice but also of educational philosophy. In my mind, there was no question that the Law School had to somehow respond in a way that would show our students we were willing to stand behind our values.

19. I appointed a Task Force, chaired by Professor Alan Minuskin, to study how we might work to minimize or undo the harm that the Solomon Amendment was inflicting on our school and our students. The students and faculty who participated in that Task Force worked to devise some creative ways of allowing the Law School to adhere as much as possible to the critical purpose of its nondiscrimination policy: the refusal to aid and abet the practices of discriminatory employers.

20. In addition, Professor Dan Barnett spearheaded an effort by students and faculty to organize support for passage of the Frank-Campbell Amendment, which sought to exempt the critical student-aid funds from the reach of Solomon. Members of the BC Law community were critical to the ultimate success of that effort.

21. Meanwhile, our Task Force devised a specific policy that would satisfy the letter of the Solomon Amendment but minimize the degree of entanglement by the Law School. At many Law Schools, the response

to Solomon was to allow military recruiters—albeit reluctantly and under protest—but to do so by re-admitting the military to the ordinary routine of the placement office program. At most schools that means providing substantial logistical support to recruiters, such as collecting resumes, scheduling individual student interviews, providing clerical support to the recruiters, and—literally—care and feeding. Working with people at other law schools through SOGII, the Task Force did what we as law professors are always telling our students to do, but sometimes forget to take our own advice. They actually read and carefully analyzed the statute and regulations.

22. The Task Force concluded that we were not required to provide logistical support under Solomon. And, if we really mean what we say in our Nondiscrimination Policy, we cannot provide one iota of greater support or facilitation than is required by the literal language of the statute.

23. Thus, the policy that we followed beginning in the 1998-99 academic year we believed, complied with Solomon. The career services office itself played no role whatsoever in arranging recruiting visits. If a service requested an on-campus interview, we would schedule a room. We kept a folder on reserve in our library in which we place notices of any on-campus interviews that have been scheduled. Students who were interested could get in touch with the recruiter and make whatever arrangements they wished about times or other aspects of the interview. But the school had no involvement in the process other than, as the statute says, not "preventing entry to the campus."

24. The tension between the Law School and the central University administration over this issue was

particularly acute at Boston College. I was never directly told by the central administration that I should not be taking the actions I was taking, or that I should try to stop the students and faculty from their efforts, but in a variety of subtle ways, it became clear to me that they would certainly prefer if things at the Law School were different.

25. So the constant message I received was "Couldn't we be a little quieter about this." The single moment that I best recall was late one Friday afternoon after a long and difficult week on this and other matters, when Alan Minuskin and Dan Barnett were in my office telling me about the next step in their repeal efforts, seeking funding to support it, and warning me that it would increase the BC Law profile. I heard the administrator voice inside me say "Couldn't we just be quiet about this."

26. But my conversations with our gay and lesbian students had made me realize that saying "Couldn't you just be quiet about this" is—precisely—what discrimination against gays and lesbians means. We who are straight do not have to keep our sexuality in a closet. We do not have to fear that on taking a new job it might not be safe to put a picture of our life's partner on our desk. We do not have to "just be quiet." The correlative of discrimination is privilege. We who are straight enjoy the privilege of being free to integrate our loving relationships into the rest of our personhood, both in the private and the public sphere. That is a right that our society still denies to gays and lesbians. What did our nondiscrimination policy mean if we weren't willing to fight to protect *all* of our students?

27. As Edmund Burke is thought to have said, "All that's necessary for the triumph of evil is for good men

to do nothing." No matter what our professional roles, all of us are, from time to time, called upon to take actions, large or small, that will have an impact on the ability of our gay and lesbian colleagues to live full, integrated lives. We all must pledge to work harder to realize when we are in those moments and to act appropriately. So, when the moment of truth finally came to me, there was just no way that I could look the gay and lesbians students in the eye and ask then to "just be quiet."

28. As Professor Minuskin describes in his declaration, see Minuskin Decl. at ¶¶ 29-35, BC Law eventually had to abandon entirely the application of its nondiscrimination policy to military recruiters when the military, after revising its regulations under Solomon, threatened Boston College with the loss of its federal funds. The fact that BC Law has been forced, under pressure of loss of essential funding to the rest of the University, has produced an atmosphere of great sadness and disappointment at the Law School.

* * * * *

EXCERPTS OF EXHIBIT 1 TO ROGERS DECLARATION

Supplemental Report on Amelioration

December 15, 1998

TO: Members and Friends, Section on Gay and Lesbian Legal Issues

All Law School Deans and Faculties of the United States

FR: Executive Committee, AALS Section on Gay and Lesbian Legal Issues

RE: On-Campus Military Recruiting - Balancing AALS Rules, Other Nondiscrimination Policies and the Solomon II Amendment

On September 15, 1998 the Section on Gay and Lesbian Legal Issues (Section) of the American Association of Law Schools (AALS) issued a report with recommendations (Report) on military recruiting at law schools, and on law school responses to recent federal legislation known as the "Solomon II" amendment. That amendment threatens to cut off three specified types of financial aid funds, mainly loans, to students at law schools that do not provide the military with reasonable access to campus, to students, and to certain information about students. The amendment therefore poses twin threats—first, to the ideal of a bias-free education environment and, second, to the availability of federal financial aid for needy and deserving students. This report ("Supplemental Report") supplements the original Report to help schools manage proactively these twin threats.

* * * * *

A final point bearing emphasis at the outset is that we focus below, as we did in the September 15 Report, on the law's requirements only because the objective is to avoid *uncompelled* complicity in *any* form or way in *any* employer's practice of de jure discrimination. But we underscore now that the most important question is what our institutions *should* do, in fairness to *all* our students, apart from what the law technically requires. We believe that our institutions should not help open up new placement opportunities and then help shut them down to a targeted class of its own students. We believe that no law school should discriminate invidiously against *any* student on the basis of *any* identity, whether or not a law allows it. By doing more than this law requires in this particular instance, our profession will be doing less than we should to be fair to *all* our students. By doing no more than this law requires, our profession can be fair both to deserving students who need financial aid as well as to sexual minority students who suffer the stigma and exclusion of the military's de jure discrimination.

Indeed, by voluntarily doing more than legally required, law schools allow themselves to be maneuvered into a false choice between need and principle. The law patently is designed to force institutional choices between two classifications of students: one based on class or need and the other based on gender or sexual orientation. This legislation is designed to force schools to select *which* among their students will be deemed expendable—those that need financial aid to secure a legal education or those that need anti-discrimination protection to secure their professional opportunities. Schools may not be able to avoid altogether the appearance of making such a destructive and divisive

choice, but they can avoid exacerbating the fact and effects of the invidious choice that this legislation invites.

If schools permit themselves to be put to false choices by mistakenly or inadvertently doing more than the law requires, they will be compounding the detrimental *on-campus* effects of military discrimination. These effects can include heightened tensions and on-campus acrimony fueled by the perception or reality that a school's actions represent or signal a "choice" between one or another of its own students, as well as a betrayal of the larger commitment to nondiscrimination. Schools should not permit themselves to be manipulated into this self-wounding position. Our profession should not permit this law unnecessarily to disturb the peace of law school campuses across the country by its forced reintroduction of flagrant, de jure prejudice into the educational environment. * * *

II. Introduction: De Jure Military Discrimination

Until recently, law schools did not permit the military to recruit on campus because the military discriminates de jure in several ways. First, the military refuses to interview, much less employ, any persons who it deems to be lesbian, gay or bisexual. Second, although the military will employ women for some positions, statutes and regulations prohibit the promotion of women to many career-advancing positions. Third, the military fires and denies various benefits to personnel whom it deems to be lesbian, gay, or bisexual. Fourth, the military engages in horrific practices targeting suspected lesbians, gays, and bisexuals, which include demands that individuals "name names" or be "outed" to their parents and relatives. These "search, out and destroy" campaigns

terrorize and victimize individuals with exemplary records of service and no record of misconduct simply on the basis of status or identity.

Law schools play a direct and special role in these "investigations" because military lawyers are the chief instruments of these witchhunts. Foreseeably, law students recruited on campus this year will in time become the legal personnel who seek out and use information extracted through such "investigations" to prosecute service members suspected of being lesbian, gay or bisexual, and regardless of whether those service members in fact have engaged in any conduct that violates military rules. In addition to bringing de jure discrimination directly to the law school, permitting the military to recruit on campus—much less providing administrative support for such recruitment —undermines social and legal commitments to nondiscrimination in far-reaching ways with profound human repercussions.

In response to Solomon II's twin threats, the AALS Executive Committee decided to "excuse" law schools' "noncompliance" with its nondiscrimination policy on two conditions: (1) the noncompliance resulted from Solomon's requirements and (2) law schools took action to ameliorate the detrimental effects of the discrimination coerced by Solomon. As AALS Memorandum 97-46, attached to this Supplemental Report, makes plain, "excused noncompliance" applies only to the military, and only for so long as Solomon II remains in effect in its current form. The Section Report of September 15 therefore encouraged law schools to tailor access to the military and avoid entanglement with its activities, emphasizing instead the duty to ameliorate, until such time as this law is modified,

repealed or invalidated. In this way, Solomon II's twin threats—to the ideal of a bias-free educational environment *and* to the need of deserving students for financial aid—can be blunted simultaneously until this law is removed or deactivated.

Based on a detailed analysis of the statute and other binding mandates established by preexisting nondiscrimination laws or policies, that Report also distilled ten principles ad guidelines for law schools' response to the new legal environment crated by Solomon II's enactment. That legal environment, the Report emphasized, required law schools to balance Solomon's new requirements against the practices already established under the substantive nondiscrimination principles embodied in the existing policies of the AALS, the law school, the university and/or local governments. The balanced and contextual approach encapsulated in the ten principles of the September 15 Report was designed to reduce to a minimum the detrimental effects of the on-campus discrimination forced by Solomon's threat of a financial aid cut-off without triggering the cut-off. To facilitate their easy review, a copy of the ten principles is appended at the end of this Supplemental Report.

In light of the new regulations—which we believe do not make any significant changes—this Supplemental Report identifies new ideas, suggestions and strategies for law schools. As with the original Report, this Supplemental Report is designed to minimize access and avoid entanglement as a way of reducing as much as possible the statute's twin threats: coupling minimum access with maximum amelioration is the best strategy for schools that wish to preserve as much as possible a bias-free educational environment while also preserving their students' eligibility for the affected federal

financial aid funds. This Supplemental Report's continuing focus on maximum amelioration ideally will help law schools to offset the remaining detrimental effects of Solomon II's actual coercion until the law is repealed, modified or invalidated.

III. The Objective: Avoiding Uncompelled Complicity

It bears note at the outset that "excused noncompliance" with AALS ByLaw 6.4 and Executive Committee Regulation 6.19 is an exception to the general principle of nondiscrimination. AALS ByLaw 6.4 expressly embodies this principle, prohibiting discrimination on the basis of "race, color, religion, national origin, sex, age, handicap, or sexual orientation" in every facet of legal education, from application and enrollment to promotion, graduation and employment. Executive Committee Regulation 6.19 specifically establishes "the obligation to provide an equal orientation opportunity to obtain employment without discrimination" on the basis enumerated above. The addition of sexual to the AALS nondiscrimination policy was adopted in 1990 by *unanimous* vote of the AALS House of Representatives. This principle additionally is endorsed and embodied in similar policies enacted by law schools and/or universities, which likewise mandate equal opportunity in legal education regardless of identities based on race, ethnicity, nationality, religion, gender, age, sexual orientation and physical ability.

* * * * *

* * * To ensure that amelioration is meaningful specifically for lesbian, gay, bisexual and women students—the ones who most bear the brunt of law schools' acquiescence to Solomon II's discriminatory

effects—the September 15 recommendations urge law schools to consult directly and continually with those student groups in designing, implementing and maintaining ongoing ameliorative programs and policies. If appropriate, concerned alumni and community leaders also should be included in amelioration initiatives. The bottom line is that all law schools should ensure that amelioration is effective both formally and *in practice*, which requires advance planning, timely consultation, careful action, dedication of resources and continued vigilance until such time as this law is repealed, modified or invalidated.

* * * * *

EXCERPTS OF EXHIBIT 1 TO ROSENKRANZ DECLARATION

BYLAWS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, INC

Section 6-4. Diversity: Non-Discrimination and Affirmative Action.

a. A member school shall provide equality of opportunity in legal education for all persons, including faculty and employees with respect to hiring, continuation, promotion and tenure, applicants for admission, enrolled students, and graduates, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, handicap or disability, or sexual orientation. [See *Interpretive Principles*]

b. A member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, handicap or disability, or sexual orientation. *A member school shall communicate to each employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity.*

c. A member school shall seek to have a faculty, staff, and student body which are diverse with respect to race, color and sex. A member school may pursue additional affirmative action objectives.

* * * * *

6.19 The Obligation to Provide an Equal Opportunity to Obtain Employment Without Discrimination. A member school shall inform employers of its obligation under Bylaw 6-4(b), and shall require employers, as a condition of obtaining any form of placement assistance or use of the school's facilities, to provide an assurance of the employer's willingness to observe the principles of equal opportunity stated in Bylaw 6-4(b). A member school has a further obligation to investigate any complaints concerning discriminatory practices against its students to assure that placement assistance and facilities are made available only to employers whose practices are consistent with the principles of equal opportunity stated in Bylaw 6-4(b).

EXCERPT OF EXHIBIT 3 TO ROSENKRANZ DECLARATION

(The following statement was written by AALS Executive Director Carl Monk. It was sent to Deans of AALS Member and Fee-Paid Schools on August 13, 1997.)

Military Recruiting at Law School Career Services Offices:

Update on Actions Regarding Executive Committee Regulation 6.19, the Obligation to Provide Equal Opportunity to Obtain Employment Without Discrimination

* * * * *

The Executive Committee has considered at length the implications of the Solomon Amendment and the Department of Education's determination that the Amendment included Perkins Loan and Work-Study funds. The Committee recognizes that the Amendment, as construed, places most law schools in the difficult position of either foregoing financial aid funds that are critical to their students or receiving the financial aid funds but failing to provide an environment that adequately protects its students from the experience of discrimination. The Committee believes that each school must be permitted to decide for itself how to resolve this conflict without being held in impermissible violation of the bylaws. Thus, so long as the Solomon Amendment remains in effect in its current form, each member school will be free to choose whether to continue to comply with the bylaw requirements as it applies to the military. Schools that choose not to comply will have their noncompliance excused so long as they engage in appropriate activities to amelio-

rate the negative effects that granting access to the military has on the quality of the learning environment for its students, particularly its gay and lesbian students.

Before making a decision to permit the military to interview, we urge each school to examine the actual extent of financial aid and other funds that it is at risk of losing, to explore ways of avoiding the loss of fund through turning to alternative sources, and to consider the range of ways that it might adopt to ameliorate the negative effects of granting access, if access were to be granted.

For purposes of compliance with the bylaws, schools that choose to permit access to the military may demonstrate adequate "amelioration" by a number of different actions. As a starting point, each school should assure that all its students, as well as others in the law school community, are informed each year that the military discriminates on a basis not permitted by the school's nondiscrimination rules and the AALS bylaws and that the military is being permitted to interview only because of the loss of funds that would otherwise be imposed under the Solomon Amendment (or, in appropriate cases, because of higher university directives that compel the law school to permit access). Other ameliorative acts that schools might consider include forums or panels for the discussion of the military policy or for the discussion of discrimination based on sexual orientation. Although no specific type of amelioration is required, the Executive Committee will examine the actions schools take in the context of the totality of the school's efforts to support a hospitable environment for its students. In assessing that environment, the Association will consider, among

other things, the presence of an active lesbian and gay student organization and the presence of openly lesbian and gay faculty and staff. We would be grateful if schools would advise us of effective amelioration strategies in which they have engaged so that we can periodically share those strategies with other member schools.

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EXCERPT OF EXHIBIT 5 TO ROSENKRANZ DECLARATION

PERSCOM [Seal]
Online

JAG FUNDED LEGAL EDUCATION PROGRAM (FLEP)

FLEP allows selected officers an opportunity to obtain a law degree at government expense. There are normally up to 15 slots a year Army-wide; if funding permits.

Eligibility criteria:

- Be active duty commissioned officers
- Have two to six years of active duty at the time law school commences
- DA photo at current grade not older than five years
- Further eligibility requirements are outlined in AR 351-2

Application procedures:

Submit an application packet, forwarded and endorsed by the chain of command (through the first 0-6) to arrive at MI branch. The suspense date to submit a FLEP packet to MI Branch is 1 October each year to allow processing prior to the board. The suspense to the FLEP proponent is 1 November 2002. Interested applicants must enclose their LSAT scores, DA Photos, and official college transcripts.

EXHIBIT 5 OF SEIDMAN DECLARATION

A STATEMENT FROM MEMBERS OF THE GEORGETOWN UNIVERSITY LAW CENTER FACULTY

We the undersigned, as members of the faculty of Georgetown University Law Center, unequivocally abhor the federal law which prohibits gay men, lesbians and bisexuals from serving in the armed services if such individuals ever disclose or act upon their sexual orientation. Such a policy is contrary to our fundamental principles of equality, honesty, and dignity. Hence, we reaffirm the faculty's resolution in 1991 that the armed services should be barred from recruiting GULC students on campus or with the assistance of our career services. We call upon the United States Congress to repeal the disgraceful "Solomon Amendment" which financially coerces schools to allow the armed services to recruit on campus.

All GULC students have the right to pursue careers in the military and we do not wish to interfere substantively with the ability of GULC students to obtain such employment. Indeed, we hope students educated at GULC under the principle carved on our library—"law is but the means; justice is the end"—will work within the military and other settings to achieve a true commitment to antidiscrimination.

We believe sexual orientation has no bearing on an individual's qualification to perform any job in any setting, be it the armed services, federal, state and local governments, or private entities. Moreover, we believe all individuals should be allowed to perform their jobs while being candid about their sexual orientation.

Finally, we believe an individual's sexual orientation should never be the basis for any discriminatory action taken against such individual. We look forward to the day when all segments of our country and its government can affirm these principles through word and action.

Signed,

[Signatures Omitted]

EXCERPT OF SWEENEY DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ___

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, ET AL., DEFENDANTS

DECLARATION OF ROBERT SWEENEY

I, Robert Sweeney, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am a graduate of New York University School of Law ("NYU Law" or "the Law School"), which I attended from August 1999 until May 2002. I am also gay. From April 2000 to April 2001 I served as President of the Bisexual, Gay, and Lesbian Law Students Association (BGLLSA, n/k/a OUTLAW).

2. When I was deciding where to go to law school, I wanted to ensure that I spent those three critical years of study, exploration, challenge and growth at an institution that would measure my insights and contributions on the basis of their merits. I would be working too hard, assuming too many new responsibilities and taking too many financial and intellectual risks to willingly place myself in any other kind of environment.

I was not merely starting law school, I was starting a lifelong career as a lawyer; before stepping foot in the classroom I wanted an assurance that those responsible for the foundations of my legal education and training could and would insist on my equality, my dignity, and my humanity.

3. For these and other reasons, I was drawn to the strong sense of community at NYU Law, and to the promise of respect and equality that the Law School held out to me. I also believed that NYU Law stood out among other institutions for its very public, very sustained, and very pervasive commitment to nondiscrimination. All of the law schools I considered have policies that prohibit discrimination on the basis of sexual orientation, and all of them require that employers who use the law schools' services to recruit law students abide by that policy. However, like any statement of principle, it is the actions taken in defense of the principle that matter. NYU Law had a long historical record of insisting on maintaining its policy in the face of external pressures, particularly the various iterations of the Solomon Amendment. I was impressed with this record, and had every reason to believe that it would continue. Had I known ahead of time that these non-discrimination values would become so undermined at NYU Law, I would have chosen a different law school at which to pursue my degree.

4. As it was, by the time I graduated in 2002, NYU Law was no longer the place it was when I first enrolled. The community that I had carefully and thoughtfully selected was gone. The Law School, once a champion of equality, had become an appallingly compliant participant in discriminatory practices against its

own lesbian, bisexual, gay and transgendered ("LBGT") students.

5. This transformation began in the fall of my second year. In an October 1, 2000 letter, then-Dean of the Law School John Sexton informed the NYU Law community that personnel from the Law School's Office of Career Counseling and Placement (Placement Office) had been instructed to "grant parity of access to the military with regard to on-campus recruiting facilities." A true and correct copy of the Dean's letter is attached at Exhibit 1. Prior to this time, NYU Law had refused to provide the services or facilities of the Career Office to JAG recruiters from the various branches because the military would not sign a statement certifying compliance with the Law School's nondiscrimination policy. See Exhibit 1.

6. The basis for this decision, according to the Dean, was a change in the Department of Defense regulations interpreting the Solomon Amendment in such a way as to jeopardize millions of dollars in federal funds to the NYU Medical School. See Exhibit 1.

7. Dean Sexton promised to undertake ameliorative efforts. He said in his letter that the Placement Office would "post notices in a variety of forms noting that military practices are inconsistent with the school's non-discrimination policy," that the Law School "would actively organize fora to discuss these difficult issues," and that the Law School community would "explore, with the University and others in legal education, whether the new regulations might be challenged as illegal, and how the NYU Law School might contribute to such an effort." Exhibit 1.

8. In personal conversations with the Dean, I expressed my grave concerns about the Law School abandoning its non-discrimination policy. The Dean reassured me that he would sign on to any viable legal challenge to the Solomon Amendment, and that the Law School would engage in minimal compliance under the statute.

9. In the following months, however, I became profoundly disappointed with the way the Law School proceeded to handle the issue of military recruiting. As a threshold matter, it soon became clear that, in contrast to other law schools that had taken a far more aggressive stance by allowing the military only minimal access, NYU Law was going out of its way to overcomply with Solomon. By March 2001, the military had been given the chance to interview on NYU's campus four separate times, whereas, on information and belief, other law schools designated only one day per semester for the military to recruit on campus. The Law School not only provided opportunities for military recruiters to meet with NYU Law students, but provided services and facilities for the Army JAG Corps to meet with students from Fordham, and the Marine JAG Corps to meet with students from at least nineteen other law schools. I pleaded with the administration to engage in a thorough analysis of what was really required under the statute, and brought to their attention the decisions of other law schools to put many more limits on military recruiters.

10. The Law School's welcoming reception for the military, combined with its token and inadequate amelioration efforts, sent a painful message to me. As I explained in an October 11, 2001 letter to Dean Sexton, when the Law School assists a discriminatory employer

like the military, "[t]he Law School . . . help[s] to deny lesbian, bisexual, gay and transgendered, physically disabled and older students employment opportunities that our straight, younger and able-bodied classmates are eligible for. This creates a rift, engenders bitterness, and . . . lamentably welcome[s] bigotry back to our community." A true and correct copy of this letter is attached at Exhibit 2.

11. If the Law School wasn't going to fight for its students, we decided that we had to fight for ourselves. BGLLSA and Straights and Queers United Against Discrimination ("SQUAD"), an ad hoc student group formed in response to military recruiting at the Law School, took on the burden to raise awareness, educate students, faculty and staff, and try to maintain the spirit of the Law School's policy. I helped organize the protests on the days the military was scheduled to be on campus.

12. I was proud of our efforts—at least one JAG interviewer cancelled due to lack of interest, and BGLLSA and SQUAD members filled many of the scheduled interview slots with other recruiters. But I could not keep down my growing frustration that the Law School had done so little to support our efforts, and had done so much to accommodate the military.

13. I hoped that in the 2001-2002 academic year the Law School would rethink its approach to military recruiting and boost its efforts to defend gay and lesbian students at NYU. Particularly after the horrific events of September 11, we needed a clear statement from the Law School's leadership about the importance of equality and the protection of our fundamental freedoms. We did not get one.

14. Dean Sexton issued a statement similar to the one he wrote the year before, explaining that military recruiters would be back on NYU's campus that Fall under the same conditions. A true and correct copy of this statement is attached at Exhibit 3. I thought this communication failed to explain the Law School's status under Solomon or the rationale of its response, ignored the events of the prior year and the context of September 11, and was, overall, utterly insufficient.

15. The letter was, for me, the Law School's final repudiation of its non- discrimination policy. I no longer believed the Law School stood by its policy, and I told the Dean as much in a letter to him:

> The message I have received over the last two years is that although sexual orientation has been listed in our non-discrimination policy for over two decades, gays and lesbians are not regarded as full and equal members of our community. They represent a segment of the law school community which is not deserving of the same level of protection in recruitment as other groups. The trauma suffered by this group as a result of attending a law school which is now an active instrument of their mistreatment and exclusion, is not regarded as something the law school needs to be very concerned about, except in the case where it might jeopardize its accreditation. The pain and suffering of all (and I do mean all—for we have all to some degree been poisoned by distrust, bitterness and disappointment that necessarily accompanies discrimination) members of this community are not sufficient enough to compel the dean's presence at any forum dedicated to address this issue. I would be very curious to see how the same situation would have been handled if it had

been another 'protected' group's equality of opportunity at stake.

Exhibit 2.

16. I believe that the Law School abdicated its responsibility in a number of ways. Dean Sexton delegated Solomon-related issues to the Vice Dean, thereby effectively washing his hands of the issue and sending the message to the Law School community that this major shift in a decades-old policy was less significant and unjust than it really was. It appeared that the Vice Dean, in turn, did not have the necessary authority to make decisions with respect to handling Solomon issues. It also appeared that he did not have the time, energy or inclination to adequately address Solomon's effect on the Law School—neglecting to respond fully to students' concerns and failing to even read and understand the language of the statute. At a forum demanded by the students, the Vice Dean openly admitted that the Law School's reaction would have been different if instead of the LBGT community, it was a particular religious or racial group whose equality of employment opportunity was compromised. In addition, after encouraging vigorous student protest, the Vice Dean and the other faculty criticized student protesters for allegedly going too far by publicly using the names of students who interviewed with the military, and in a particularly inflammatory flyer, these faculty compared the student protesters to McCarthyites and anti-abortion activists who threaten and/or kill abortion doctors. The net effect of the faculty and administration's handling of Solomon-related issues was not only over-compliance with the regulation, it also created a divisive and bitter atmosphere which greatly detracted from the Law School's primary reason for

being: a place to teach and to learn. On one side were students who felt marginalized and angry at how easily they were stripped of their place at the table; on the other side were students who could not possibly understand what all the fuss was about and who were clearly legitimized in their dismissal of that "fuss" by the administration's actions. In the middle were a great number of students who were confused and distracted from their studies by all the protest and vitriol flying about, not to mention the faculty and members of the administration who were faced with a human rights and political divide becoming very personal in their classrooms or with employees who flatly refused to assist in any part of a discriminatory employer recruiting on campus. Do you fire someone for standing by a 22-year old policy of equal treatment?

17. The whole tenor of the Law School community and my experience as a student changed drastically from my 1st to my 2nd year. I carefully chose NYU Law because I believed in its record and its stated mission. I came to the Law School expecting that I would be guaranteed standing as a full member of the community and wound up dismissed, objectified and vilified by other members of that community. I came to the Law School hoping to learn the law, and wound up fighting a civil rights battle I thought had been laid to rest 22 years earlier.

18. My penultimate remarks to Dean Sexton describe how I felt by the end of my law school career:

> The giddy excitement which sustained me through my first year at this law school is gone. It has been replaced by anxiety, sadness, anger and disappoint-

ment. My heart has been broken, and every day here is a painful reminder of a trust betrayed.

Exhibit 2.

I declare under the penalty of perjury that the foregoing is true and correct.

* * * * *

EXHIBIT 1 TO ROSENKRANZ DECLARATION

From: Kennedy James P Maj 305
AMW/JA[James.Kennedy@mcguire.af.mil]

Sent: Monday, October 20, 2003 4:23 PM

To: Kennedy James P Maj 305 AMW/JA

Cc: Turner Lisa L Lt Col 305 AMW/JA; Kennedy James P Maj 305

Subject: USAF—summer intern program—deadline in NOVEMBER

Greetings, Career Services offices—

First, thank you again for all your assistance in the Fall interview program—it was great to meet so many talented and impressive law students.

Second, a couple of important points for your 2Ls to keep in mind about the Air Force Summer intern program. I am afraid that unless you actively convey these to your students some interested students might not get the word:

1. The deadline is 17 NOVEMBER—less than a month away. Last year it was in February, and they might assume that this year will be the same.

2. The application process is not the same as for 3 Ls who apply for JAG positions. The intern application can be found at the linked website (not in the AF JAG brochure). Also, there is no interview involved.

The internship program is a fantastic opportunity to get a first-hand JAG experience without incurring an active-duty service commitment. You may have 3Ls who did the Air Force internship last year—if so, I'd like to suggest that you encourage them to make

themselves available to tell interested 2Ls what they thought about it. Interested students may also contact me, or they can contact HQ USAF/JAX with their questions.

The job announcement can be found at: http://jobsearch.usajobs.opm.gov/jobsearch.asp?q=summer+intern+air_force&salmin=&salmax=&FedEmp=N&sort=rv&vw=d&brd=3876&ss=0&FedPub=Y&SUBMI

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